

IN THE SUPREME COURT OF OHIO

Case No. 2015-0385

State of Ohio,)	
)	On appeal from the Wood County
)	Court of Appeals,
Plaintiff-Appellant,)	Sixth Appellate District
)	Case No. WD-13-086
v.)	
)	
Rafael Gonzales,)	
)	
)	
Defendant-Appellee.)	

APPELLEE RAFAEL GONZALES' OPPOSITION TO APPELLANT'S MOTION TO STAY

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In its jurisdictional appeal, the state requests a stay of the Sixth District’s judgment. If granted, Mr. Gonzales remains the state’s prisoner even though the appeals court held unanimously that the prosecution did not present even the bare minimum trial evidence required to sustain a conviction under R.C. 2925.11(C)(4)(f)—the same charge for which the state seeks Gonzales to remain imprisoned.

The problem with the state’s three-paragraph rationale is it offers an overly narrow view of Gonzales as an individual (saying he might “go back to Mexico”) and of justice itself.

Indeed, the state’s brief gives only the state’s perspective and thereby overlooks the obvious: what if this court accepts the jurisdictional appeal and *affirms* the Sixth District? That is, why risk the unjust consequences of forcing Gonzales to remain imprisoned given the strong possibility that he will prevail?

Gonzales has already been imprisoned in this case for almost three years. And if he’s forced to remain imprisoned while this case is under review, yet ultimately prevails, Gonzales and his family will be forced to pay a huge personal cost that can’t be remedied: he will have been *incarcerated for almost five years* by the time this case is over even if he prevails (as he did below). This unfair result would be a particularly egregious injustice when the issue on the state’s appeal is its own failure to satisfy its trial burden.

Risking this result is not outweighed by the state’s naked claim that if released, Gonzales might “go back to Mexico.” *First*, while Gonzales is Hispanic, he is a longtime Fremont resident with his family—he does not live in “Mexico.” *Second*, he should be free to go wherever he wants because, as the state’s brief indicates, he has already “served [his] time.” *Third*, the state’s sole concern is that if this court reverses, then it may be difficult to apprehend Gonzales if he

goes “back to Mexico.” This is so speculative it doesn’t merit much consideration. *Fourth*, the state does not contend that Gonzales is violent, likely to re-offend, or anything of the sort.

Thus, the only risk of not staying the judgment below is that the state *might* prevail and Gonzales *might* be back in Mexico. But this is true in *every* appeal where the state seeks to keep a defendant imprisoned while it appeals, and therefore amounts to very little.

Contrast this with the risk of keeping Gonzales imprisoned—even if he prevails he will have spent over another year imprisoned with no recourse. Running the risk of this harsh result is not outweighed by the state’s “Mexico” rationale.

Finally, the state filed its motion to stay in its jurisdictional-appeal case, not in connection with its notice of certified conflict. The odds of accepting the jurisdictional appeal are slim. Further, as explained below, there is no conflict in this case. Indeed, the state never even cited—either at the trial court or in the court of appeals—the supposed “conflict” case, *State v. Smith*. But even if there were a conflict, and even if the jurisdictional appeal were accepted, the state’s legal argument lacks merit as explained immediately below.

I. Gonzales should not remain imprisoned because he is likely to prevail if this court accepts review since the state’s arguments contradict the relevant statutes’ plain language.

The allegation in this case was that Gonzales possessed 100 grams or more “of cocaine.” But the state offered absolutely no evidence as to how much “cocaine” Gonzales possessed. At best, the evidence was that Gonzales possessed a substance containing cocaine and the overall weight *of that substance* was over 100 grams—no evidence suggested the weight “*of cocaine*” possessed. That is, if a substance weighing over 100 grams contains cocaine, it begs the question as to the weight “of cocaine” at issue. Thus, the Sixth District held that the weight specification wasn’t proven at trial. The Sixth District is absolutely correct.

Boiled down, the state's legal argument is that:

1 gram “of cocaine” + 99 grams of baking soda = 100 grams “of cocaine.”

And Gonzales argument is that:

1 gram “of cocaine” + 99 grams of baking soda \neq 100 grams “of cocaine.”

Rather, 1 gram of cocaine plus 99 grams of baking soda equals 1 gram of cocaine and 99 grams of baking soda. As determined by the Sixth District, Gonzales is correct because “cocaine” is a term of art defined by R.C. 2925.01(X):

"Cocaine" means any of the following:

- (1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;
- (2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;
- (3) A salt, compound, derivative, or preparation of a substance identified in division (X)(1) or (2) of this section that is chemically equivalent to or identical with any of those substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves if the extractions do not contain cocaine or ecgonine.

Thus, nothing other than cocaine is “cocaine.” That is, any substance that is not “cocaine”—e.g., baking soda, sugar etc.—does *not* count toward the minimum 100 grams “of cocaine” that prosecutors must prove the defendant possessed in cases charged under R.C. 2925.11(C)(4)(f), as here. Section 2925.11(C)(4)(f) states that:

If the amount of the drug involved equals or exceeds ***one hundred grams of cocaine***, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

Because one gram of cocaine plus 99 grams of baking soda never equals one hundred grams “of cocaine”—the substance defined by R.C. 2925.01(X)—the overall weight of a mixture containing cocaine is wholly irrelevant: the state must prove the weight “*of cocaine*” within the mixture. This is basic statutory interpretation: courts must apply a statute’s plain language as written by the legislature.

Thus, the state’s assertion that the Sixth District “foundationally changed the way in which all cocaine cases...are to be prosecuted and proved” is wrong.

It is *the state* that seeks the change: the state’s rationale would require this court to rewrite the relevant statutes to either (1) expand the definition of “cocaine” in R.C. 2925.01(X) or (2) rewrite R.C. 2925.11(C)(4)(f) such that non-cocaine substances count toward the targeted weight “of cocaine.” This court has no power to do either.

The state’s discussion of “purity” is equally unavailing. The Sixth District never held that the “purity” must be shown. Indeed, all that must be shown is 100 grams or more “of cocaine.” Thus, an overall mixture weighing 101 grams may suffice as long as it is shown that it includes 100 grams or more “of cocaine.” And it’s equally true that an overall mixture weighing 1,000 grams may suffice as long as it’s shown that it contains 100 more of grams “of cocaine.” In each example the “purity” is different. Yet both examples could support a conviction under R.C. 2925.11(C)(4)(f). As just shown, purity is immaterial: what matters is the amount “of cocaine.”

But the state’s discussion of “purity” unwittingly proves the point. For the whole concept of “purity” concedes that a portion of the substance is “cocaine” and a portion is *not* “cocaine.” Of course, what matters is the amount “of cocaine.” The amount that is *not* cocaine is meaningless under R.C. 2925.11(C)(4)(f).

For example, at the oral argument below, Judge Jensen asked counsel for the state to

articulate how many grams “of cocaine” the trial record shows Gonzales possessed. No answer could be given, which is precisely the point: the state has no cogent rationale on the merits and therefore its motion to stay is inherently weak. Indeed, the question certified at the end of the Sixth District’s opinion is: “Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?”

This question is answered by the plain language of R.C. 2925.11(C)(4)(f) itself. “If the amount of the drug involved equals or exceeds one hundred grams *of cocaine*, possession of cocaine is a felony of the first degree...” The definition of “cocaine” under R.C. 2925.01(X) doesn’t include “filler materials.” Thus, the answer to the certified question is “YES.”

II. No conflict between *State v. Gonzales* and *State v. Smith* exists.

Interestingly, the state never relied upon *State v. Smith* below yet invokes it in its motion to stay. And while it’s true that the Sixth District certified a conflict *sua sponte*, a careful review of *Smith* shows that there actually is no conflict here because the defendant’s argument in *Smith* was totally different than appellee’s argument here:

Because some of the things commonly mixed with cocaine may be considered “food items” (i.e., caffeine, baking soda, sugar, corn starch, and inositol), Smith claims the state was required to determine what part of the substance he sold was cocaine and what part was food. In making this argument, he cites R.C. 3715.01(A)(3)(a), which defines “food” as “[a]rticles used for food or drink for humans or animals.”

State v. Smith, 2011-Ohio-2568, ¶11.

Of course, this is not Gonzales’ argument. His argument is that, no matter what is mixed with “cocaine,” R.C. 2925.11(C)(4)(f) plainly requires the state to prove the weight “of cocaine.”

Whether non-cocaine substances qualify as “food” is beside the point. Further, unlike *Smith*, this is *not* a trafficking case.

Finally, the state has *not* asked for a stay in the certified-conflict case.

Conclusion

Mr. Gonzales has already been incarcerated for almost three years on a charge that this state’s second-highest court found unanimously to be unproven at his trial. If he must remain Ohio’s prisoner for another year or two while this case is pending—assuming for the sake of argument that this court even accepts the state’s appeals—and this court affirms (the likely result) Gonzales will have lost almost five years of his freedom on a case the state didn’t prove. That would be an injustice that’s too risky to take given the state’s limited rationale for taking it. Thus, the state’s motion to stay should be **denied**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2015 a true and accurate copy of the foregoing was sent by U.S. Mail, postage prepaid to the following:

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