ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case Nos. 2015-0384, 2015-0385
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Wood County
v.	:	Court of Appeals,
	:	Sixth Appellate District
RAFAEL GONZALES,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. WD-13-086
	:	

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
LAW AND ARGUMENT	6
CERTIFIED CONFLICT: Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?	6
PROPOSITION OF LAW: In a prosecution under R.C. 2925.11(A) and (C)(4), the prosecution does not need to prove that the drug involved was pure cocaine; instead, the prosecution need only prove that the drug involved was "cocaine or a compound, mixture, preparation, or substance containing cocaine." The offense level, furthermore, is determined by the total weight of the drug involved (the compound, mixture, preparation, or substance containing cocaine), not just the weight of actual cocaine contained therein.	6
A. Introduction	6
B. Stautory Construction	7
C. The Evolution of R.C. 2925.11 over the Last Twenty Years	12
D. Purity of the Drug Involved Under R.C. 2925.11 Has Never Been Required	15
CONCLUSION	21
CERTIFICATION	21
APPENDIX	22

TABLE OF AUTHORITIES

Cases

Baender v. Barnett, 255 U.S. 224, 41 S.Ct. 271, 65 L.Ed. 597 (1921) 10

Black-Clawson Co. v. Evatt, 139 Ohio St. 100, 38 N.E.2d 403, 22 O.O. 63 (1941)..... 8

Church of the Holy Trinity v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892)..... 10

Cochel v. Robinson, 113 Ohio St. 526, 149 N.E. 871, 3 Ohio L. Abs. 740 (1925)..... 7

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 122 S.Ct. 1146, 117 L.Ed.2d 391 (1992)..... 7

Garr v. Warden, Madison Corr. Inst., 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063..... 20

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989)..... 10

Henry v. Central Nat'l Bank, 16 Ohio St.2d 16, 242 N.E.2d 342, 45 O.O.2d 262 (1968)..... 7-8

Lynch v. Overholser, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962). 10

MacDonald v. Bernard, 1 Ohio St.3d 85, 438 N.E.2d 410, 1 OBR 122 (1982)..... 8

Markham v. Cabell, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945) 10

Mishr v. Bd. of Zoning Appeals, 76 Ohio St.3d 238, 667 N.E.2d 365 (1996)..... 8

Muniz v. Hoffman, 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975) 10

NLRB v. Fruit & Vegetable Packers & Warehousemen, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964)..... 10

Oneale v. Thornton, 10 U.S. 53, 3 L.Ed. 150, 6 Cranch 53 (1810).... 9

Perry v. Commerce Loan Co., 383 U.S. 392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966)..... 11

Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932)..... 10

State v. Alexander, 8th Dist. Cuyahoga No. 85688, 2005-Ohio-5200.... 16

State v. Anderson, 12th Dist. Fayette No. CA2008-07-026, 2009-Ohio-2521..... 16

State v. Arnold, 61 Ohio St.3d 175, 573 N.E.2d 1079 (1991)..... 9

State v. Banks, 182 Ohio App.3d 276, 2009-Ohio-1892, 912 N.E.2d 633 (10th)..... 16

State v. Barker, 2nd Dist. Montgomery No. 12732, 1992 Ohio App. LEXIS 311 (Jan. 30, 1992)..... 15

State v. Baxla, 4th Dist. Ross No. 1356, 1988 Ohio App. LEXIS 90 (Jan. 19, 1988)..... 17

State v. Bielecki, 11th Dist. Trumbull No. 2011-T-0087, 2012-Ohio-2124 12, 16

State v. Bledsoe, 5th Dist. Stark No. 2003CA00403, 2004-Ohio-4764..... 16

State v. Brooks, 8th Dist. Cuyahoga No. 50384, 1986 Ohio App. LEXIS 5735 (Feb. 27, 1986)..... 16

State v. Brown, 107 Ohio App.3d 194, 668 N.E.2d 514 (3rd Dist. 1995).. 15

State v. Burrell, 8th Dist. Cuyahoga No. 86702, 2006-Ohio-2593..... 16

State v. Chandler, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234..... 20

State v. Chandler, 157 Ohio App.3d 672, 2004-Ohio-3436, 813 N.E.2d 65 (5th Dist.)..... 16

State v. Colbert, 1st Dist. Hamilton No. C-880471, 1990 Ohio App. LEXIS 792 (Mar. 7, 1990)..... 17

State v. Combs, 2nd Dist. Montgomery No. 11949, 1991 Ohio App. LEXIS 4277 (Sept. 10, 1991)..... 15

State v. Davis, 16 Ohio St.3d 34, 476 N.E.2d 655 (1985)..... 16

State v. Ferguson, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153... 16

State v. Freeman, 138 Ohio App.3d 408, 741 N.E.2d 566 (1st Dist. 2000) 16

State v. Fuller, 1st Dist. Hamilton No. C-960753,
1997 Ohio App. LEXIS 4398 (Sept. 26, 1997)..... 15

State v. Gilliam, 192 Ohio App.3d 145, 2011-Ohio-26, 948 N.E.2d 482
(2nd Dist.)..... 20

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461.. 1, 6, 14

State v. Hall, 5th Dist. Licking No. CA-2736,
1981 Ohio App. LEXIS 11133 (Apr. 3, 1981)..... 17

State v. Hartkemeyer, 12th Dist. Warren No. CA2014-01-008,
2014-Ohio-3560..... 17

State v. Hodge, 2nd Dist. Montgomery No. 23964, 2011-Ohio-633..... 16

State v. Hunter, 5th Dist. Licking No. 99CA0036,
1999 Ohio App. LEXIS 3870 (Aug. 19, 1999)..... 17

State v. Jarrells, 72 Ohio App.3d 730, 596 N.E.2d 477 (2nd Dist. 1991).. 17

State v. Jones, 7th Dist. Mahoning No. 06 MA 17, 2007-Ohio-7200..... 16

State v. Leonard, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191..... 17

State v. Little, 8th Dist. Cuyahoga No. 77258,
2000 Ohio App. LEXIS 4779 (Oct. 12, 2000)..... 17

State v. Long, 8th Dist. Cuyahoga No. 77272,
2000 Ohio App. LEXIS 4778 (Oct. 12, 2000)..... 17

State v. Miller, 2nd Dist. Montgomery No. 13121,
1993 Ohio App. LEXIS 3806 (July 30, 1993)..... 15

State v. Moore, 2nd Dist. Montgomery No. 21863, 2007-Ohio-2961..... 16

State v. Morris, 8th Dist. Cuyahoga No. 67401,
1995 Ohio App. LEXIS 4289 (Sept. 28, 1995)..... 16

State v. Napper, 3rd Dist. Marion No. 9-91-1,
1991 Ohio App. LEXIS 5746 (Nov. 27, 1991)..... 15

State v. Neal, 3rd Dist. Hancock No. 5-89-6,
1990 Ohio App. LEXIS 2937 (June 29, 1990)..... 15

State v. Nickles, 159 Ohio St. 353, 112 N.E.2d 531, 50 O.O. 322 (1953) 8

State v. Remy, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630..... 15

State v. Rotaru, 8th Dist. Cuyahoga No. 56499,
1990 Ohio App. LEXIS 160 (Jan. 25, 1990)..... 17

State v. Samatar, 152 Ohio App.3d 311, 334-336, 2003-Ohio-1639,
787 N.E.2d 691 (10th Dist.)..... 17

State v. Seymour, 9th Dist. Lorain No. 12CA010250, 2013-Ohio-1936.. 16

State v. Siggers, 9th Dist. Medina No. 09CA0028-M, 2010-Ohio-1353... 16

State v. Smith, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568..... 1, 15

State v. Suarez; *State v. Coca*, 10th Dist. Franklin Nos. 81AP-723,
81AP-724, 1981 Ohio App. LEXIS 10309 (Dec. 31, 1981).... 16

State v. Troutman, 9th Dist. Lorain No. 12CA010223, 2013-Ohio-4559.. 16

State v. West, 8th Dist. Cuyahoga Nos. 97398, 97899, 2012-Ohio-6138.. 17

State v. Wilson, 77 Ohio St.3d 334, 673 N.E.2d 1347 (1997)..... 7-8

State v. Wolpe, 11 Ohio St.3d 50, 463 N.E.2d 384 (1984)..... 16-17

State v. Woodland, 8th Dist. Cuyahoga No. 84774, 2005-Ohio-1177..... 16

State ex rel. Cooper v. Savord, 153 Ohio St. 367, 92 N.E.2d 390,
41 O.O. 396 (1950)..... 8-9

State ex rel. Francis v. Sours, 143 Ohio St. 120, 53 N.E.2d 1021,
28 O.O. 53 (1944)..... 7

State ex rel. Haines v. Rhodes, 168 Ohio St. 165, 151 N.E.2d 716,
5 O.O.2d 467 (1958)..... 8

State ex rel. Henry v. Triplett, 134 Ohio St. 480, 17 N.E.2d 729,
13 O.O. 53 (1938)..... 11

State ex rel. Saltsman v. Burton, 154 Ohio St. 262, 95 N.E.2d 377,
43 O.O. 136 (1950)..... 8

Sturges v. Crowninshield, 17 U.S. 122, 4 L.Ed. 529, 4 Wheat. 122 (1819) 9

United States v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)..... 11

United States v. Bishop, 894 F.2d 981 (8th Cir. 1990)..... 19

United States v. Blythe, 944 F.2d 356 (7th Cir. 1991)..... 19

United States v. Elrod, 898 F.2d 60 (6th Cir. 1990)..... 19

United States v. Holmes, 838 F.2d 1175 (11th Cir. 1988)..... 20

United States v. Hoyt, 879 F.2d 505 (9th Cir. 1989)..... 19

United States v. Kirby, 74 U.S. 482, 19 L.Ed. 278, 7 Wall. 482 (1869)... 7, 10

United States v. Larsen, 904 F.2d 562 (10th Cir. 1990)..... 20

United States v. Limberopoulos, 26 F.3d 245 (1st Cir. 1994)..... 19

United States v. Palmer, 16 U.S. 610, 4 L.Ed. 471, 3 Wheat. 610 (1818). 9

United States Nat'l Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993)..... 9

United States v. Taylor, 868 F.2d 125 (5th Cir. 1989)..... 19

United States v. Whitehead, 849 F.2d 849 (4th Cir. 1988)..... 19

Utah Junk Co. v. Porter, 328 U.S. 39, 66 S.Ct. 889, 90 L.Ed. 1071 (1946) 7

Wilson v. Kasich, 134 Ohio St.3d 221, 2012-Ohio-5367, 981 N.E.2d 814 8

Statutes

R.C. 2925.01(X)..... 12

R.C. 2925.01(GG)..... 12

R.C. 2925.03..... 15

R.C. 2925.11..... *passim*

R.C. 2929.14(D)(3)(b)..... 13, 14

Code of Ala. § 13A-12-211(c)(1), 13A-12-212..... 18

Alaska Stat. § 11.71.040(a)(3)(C)..... 18

Ariz. Rev. Stat. Ann. § 13-3401, 13-3407, 13-3408..... 18

Ark. Code Ann. § 5-64-419, 5-64-420..... 18

Cal. Health & Saf. Code § 11350-11352, 11054(f)(1)..... 18

Colo. Rev. Stat. § 18-18-403.5-405..... 18

Conn. Gen. Stat. § 21a-278(a), 21a-279(a)..... 18

Del. Code Ann. tit. 16 § 4716(b)(4), 4751C(1)(a)..... 18

Fla. Stat. § 893.13(1)(b), 893.135(1)(b)(1)..... 18

Ga. Code Ann. § 16-13-30, 16-30-31..... 19

Haw. Rev. Stat. § 712-1240—712-1243..... 18

Idaho Code § 37-2732, 37-2732(B)..... 18

720 Ill. Comp. Stat. 570/401-402..... 18

Ind. Code § 35-48-4-1, 35-48-4-6..... 18

Iowa Code § 124.401..... 18

Kan. Stat. Ann. § 21-5705, 5706..... 18

Ky. Rev. Stat. Ann. § 218A.010, 218A.1412, 218A.1415..... 18

La. Stat. Ann. § 40:967..... 18

Me. Stat. tit. 17-A § 1102-1107..... 18

Md. Code Ann., Criminal § 5-101(g)(1), 5-403(b)(3), 5-601—613..... 18

Mass. Gen. Laws. Ch. 94C § 31-32E..... 18

Mich. Comp. Laws § 333.7401-7403..... 18

Minn. Stat. § 152.01(3a), 152.021(2)(a)(1-4)..... 18

Miss. Code Ann. § 41-29-139(c)..... 18

Mo. Rev. Stat. § 195.222(2)..... 18

Mont. Code Ann. § 45-9-101, 45-9-102..... 18

Neb. Rev. Stat. § 28-416(8)..... 18

Nev. Rev. Stat. § 456.3395, 453.336-337..... 18

N.H. Rev. Stat. Ann. § 318-B:2, 318-B:26..... 18

N.J. Stat. Ann. § 2C:35-5(b), 2C:35-10..... 18

N.M. Stat. Ann. § 30-31-20—23..... 18

N.Y. Penal Law § 220.06, 220.09, 220.16, 220.18, 220.21, 220.39, 220.41 19

N.C. Gen. Stat. § 90-95(h)(3)..... 18

N.D. Cent. Code § 19-03.1-23.1(1)(c)(2)..... 18

Okla. Stat. tit. 63 § 2-401(C)(3)(b), 2-415(C)(2)..... 18

Or. Rev. Stat. § 475.005(6)(a), 475.900, 475.925..... 18

18 Pa. Cons. Stat. § 7508(a)(3)(i), 35 Pa. Cons. Stat. § 780-113..... 18

21 R.I. Gen. Laws § 28-401.1, 28-401.2..... 18

S.C. Code Ann. § 44-53-370, 44-53-375, 44-53-392..... 18

S.D. Codified Laws § 22-42-2..... 18

Tenn. Code Ann. § 39-17-417..... 18

Tex. Health & Safety Code § 481.112, 481.115..... 18

Utah Code Ann. § 58-37-8..... 18

Vt. Stat. Ann. tit. 18 § 4231..... 18

Va. Code Ann. § 18.2-248(C), 18.2-250..... 18

Wash. Rev. Code § 69.50.101(z)..... 19

W.Va. Code R. § 60A-4-401 19

Wis. Stat. § 961.16, 961.41 19

Wyo. Stat. Ann. § 35-7-1031(d) 19

21 USCS § 812(a)(4) 19

21 USCS § 841 19

Rules

Crim.R. 16(K) 4

Misc.

21 U.S.S.G. § 2D1.1 19

STATEMENT OF THE CASE

On August, 1, 2012, Rafael Gonzales was indicted on one count of Possession of Drugs, in violation of R.C. 2925.11(A) and (C)(4)(f), a felony of the first degree, including a Major Drug Offender specification. Later, a jury trial was held on November 5-6, 2013. The jury found Appellant guilty as charged, and also found that the amount of the "drug involved" exceeded 100 grams, making Gonzales a Major Drug Offender. The trial court sentenced Gonzales on November 14, 2013, to a mandatory-maximum 11-year prison sentence, as statutorily required for a Major Drug Offender.

Gonzales appealed. The Sixth District Court of Appeals affirmed Gonzales's conviction, but found that the sentencing enhancement—which concerned Gonzales possessing more than 100 grams of "cocaine or a compound, mixture, preparation, or substance containing cocaine"—was not proven at trial. Specifically, the Sixth District held that the State did not provide the weight of the pure cocaine in the "drug involved". *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 47. It then remanded the case to adjust the duration of Gonzales's sentence from eleven mandatory years for an F-1 Major Drug Offender to a maximum of 12 months for a felony of the fifth degree. The Sixth District, however, recognized that in reaching its result, that it was in direct conflict with *State v. Smith*, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 14-15. As a result, the Sixth District certified a conflict to this Court. *Id.*, at ¶ 58.

STATEMENT OF FACTS

DEA agents set up a "reverse buy" with Gonzales and a confidential informant ("CI"). A recorded phone call was then made to set up a meeting to facilitate Gonzales's purchase. Gonzales then met with the CI in a Meijer parking lot to inspect the two kilos that he wanted to buy. They talked about how much it would cost. Gonzales said he was planning to sell ten kilos that day, so he wanted to buy them from the CI at $30,000 per kilo. They opened the trunk of the CI's car and opened one of the kilos, so Gonzales could test its quality. After Gonzales tested the quality, he set up a time to buy the drugs from the CI. At that point, Gonzales tried to negotiate a lower price. Gonzales called his buyer to inform him of the negotiated price per kilo. Gonzales also told the CI that, next time, the CI needed to make bigger cuts in the package: "make a big cross so you can see it all." Gonzales showed the CI the customary way of splitting open the package. The CI had only cut a small opening in the package. He then put tape over the opening to keep the drugs from falling out. Gonzales also told the CI that if he had gotten there earlier, the two of them could have made more sales on top of the kilos that Gonzales had agreed to buy. Trial Transcript November 5, 2013 at 143-153, 156, 185, 195, 199, 206; Trial Transcript November 6, 2013 at 5, 8, 26, 36-37, 39-44; Exhibit 16.

After Gonzales tested the drugs and negotiated the price, he and the CI decided to meet at a local Super 8 hotel. The CI then immediately called Mark Apple (a DEA task-force agent), while he was driving to the hotel. Shortly after the CI arrived at the hotel, Gonzales called the CI to say that he was on his way. Later, the CI called Gonzales and told him to come to room 105. Trial Transcript November 5, 2013 at 153-155, 175.

A video camera set up by the DEA recorded the following events: Gonzales entered the Super 8 hotel room and asked if the drugs were there. Gonzales then went straight into the bathroom to look for them. Gonzales got upset and began swearing because the CI did not have the drugs with him at that point in time. The CI affirmed that Gonzales became agitated and was upset because the CI wanted to see the money before the drug deal. Trial Transcript November 5, 2013 at 162-165; Trial Transcript November 6, 2013 at 14-16, 29-30, 45-48.

Gonzales then left the hotel room and later returned with $58,000. Once that occurred, the CI called an undercover officer, who was posing as a truck driver and who possessed the drugs, to bring in the two kilos to the hotel room because Gonzales only had enough money for two kilos. While they were waiting, Gonzales said that if everything was good with the two kilos that he was buying, he would buy ten more kilos. At that point, the CI told Gonzales that he did not know how to work the money-counting machine, so Gonzales helped the CI count the $58,000. The undercover officer then entered the hotel room with Exhibit 13 (the "drug involved"), which was inside a compartment in Exhibit 3 (a mock kilo) and Exhibit 4 (another mock kilo with a hidden tracking device inside). Gonzales took the two bricks from the officer/truck driver and walked away. Trial Transcript November 5, 2013, at 169-171; Trial Transcript November 6, 2013, at 12-15, 23-24, 54-56.

Gonzales was then arrested. Trial Transcript November 6, 2013, at 56. The "drug involved" that Gonzales purchased was later confirmed at trial to be "a compound, mixture, preparation, or substance containing cocaine." Trial Transcript November 5, 2013, at 123, 155, 157-158, 177, 188-191, 193-203; Trial Transcript November 6, 2013,

at 14-16, 20, 27-28, 32-37, 42, 47-52, 63-64, 69-70; Exhibits 13, 16. Scientific testimony was not introduced at trial because the analyst who had originally tested the "drug involved" left BCI and was no longer there at the time of trial. He was, thus, unavailable to testify. In response to this, the State had the "drug involved" retested and provided the new lab results to Gonzales. Trial Transcript November 5, 2013, at 123, 125; Trial Transcript November 6, 2013, at 45. It appears from the comments of the lawyers surrounding Gonzales's motion in limine that the results from the two tests did not differ. Trial Transcript November 5, 2013, at 123, 128; Exhibits 20, 21.

At that point, Gonzales knew that the "drug involved" had been identified and weighed twice. And from those reports, Gonzales knew that the "drug involved" was "a compound, mixture, preparation, or substance containing cocaine" and that its total weight exceeded 100 grams. Trial Transcript November 5, 2013, at 128; Exhibits 20, 21. The trial court, however, excluded the BCI lab report and its author from testifying at trial pursuant to Crim.R. 16(K) because the State had not provided the second lab report more than 21 days before trial. Trial Transcript November 5, 2013, at 132. With the exclusion of the expert witness and his report, the State used federal, state, and local law enforcement agents, as well as the CI (who was a previous drug user and dealer) to confirm that the "drug involved" in the offense contained cocaine. Trial Transcript November 5, 2013, at 123, 155, 157-158, 177, 188-191, 193-203; Trial Transcript November 6, 2013, at 14-16, 20, 27-28, 32-37, 42, 47-52, 63-64, 69-70. The weight of the "drug involved"—which contained "cocaine or a compound, mixture, preparation, or substance containing cocaine" exceeding 100 grams—was also proved at trial. Trial

Transcript November 5, 2013, at 190-191; Trial Transcript November 6, 2013, at 42, 48, 52, 68-69.

At the conclusion of the trial, the jury found Gonzales guilty of Possession of Drugs, in violation of 2925.11(A) and (C)(4)(f), a felony of the first degree. The jury also found that the amount of the "drug involved" that contained "cocaine or a compound, mixture, preparation, or substance containing cocaine" exceeded 100 grams. Trial Transcript November 6, 2013, at 137. The trial court, therefore, found Gonzales to be a Major Drug Offender under R.C. 2925.11(C)(4)(f) and sentenced him to a mandatory maximum 11-year prison sentence. Judgment Entry of Sentencing, November 14, 2013.

LAW AND ARGUMENT

Certified Conflict: Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?

Proposition of Law: In a prosecution under R.C. 2925.11(A) and (C)(4), the prosecution does not need to prove that the drug involved was pure cocaine; instead, the prosecution need only prove that the drug involved was "cocaine or a compound, mixture, preparation, or substance containing cocaine." The offense level, furthermore, is determined by the total weight of the drug involved (the compound, mixture, preparation, or substance containing cocaine), not just the weight of actual cocaine contained therein.

A. Introduction

No court in Ohio has ever demanded that the purity of a drug be proved at trial: not marijuana, not heroin, not LSD, not powder cocaine, not crack cocaine. That has now changed, and it has not changed for the better. The Sixth District changed the landscape, as it relates to the prosecution of any drug offense involving cocaine. Under the guise of "statutory construction", today's Major Drug Offender is now entitled to a fifth-degree felony, even if that person fills a warehouse with his or her drugs. The reason being that no lab in Ohio does a purity/quantitative analysis of drugs; rather, it does an aggregate/qualitative analysis of the drugs. As long as there is a detectible amount of the drug involved, the aggregate weight of the substance determines the level of the offense and the resulting penalty. Here, the Sixth District read the words "of cocaine" in R.C. 2925.11 to require that it reduce a Major Drug Offender's statutorily-required, mandatory, maximum sentence of 11 years in prison to just a maximum 12 months. *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 47.

As a practical matter, the Sixth District's statutory construction is, at best, untenable. For Ohio law does not require that the purity of any drug, including those containing cocaine, be proven at trial nor are Ohio labs equipped to test for it either.

B. Statutory Construction

The primary goal of statutory construction is to implement legislative intent. As the Supreme Court of the United States has stated, the "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation ***." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 122 S.Ct. 1146, 117 L.Ed.2d 391 (1992). That idea harkens back to the overriding goal of statutory construction, which is that "[a]ll laws should receive a sensible construction." *United States v. Kirby*, 74 U.S. 482, 486, 19 L.Ed. 278, 7 Wall. 482 (1869). For as Justice Frankfurter stated, "[a]ll construction is the ascertainment of meaning. And literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44, 66 S.Ct. 889, 90 L.Ed. 1071 (1946). Sensibility, therefore, should reign supreme in statutory construction.

"The polestar of construction and interpretation of statutory language is legislative intention. In determining that intention courts look to the language employed and to the purpose to be accomplished." *State ex rel. Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E.2d 1021, 28 O.O. 53 (1944). And, when trying to determine the intent of the legislature, the entire statute must be viewed as a whole, and there should be "a construction adopted which permits the statute and its various parts to be construed as a whole and give effect to the paramount object to be attained." *Cochel v. Robinson*, 113 Ohio St. 526, 149 N.E. 871, 3 Ohio L. Abs. 740 (1925), at paragraph four of the syllabus. Again, a court's "ultimate function [is] to ascertain the legislative will." *Henry v. Central*

Nat'l Bank, 16 Ohio St.2d 16, 242 N.E.2d 342, 45 O.O.2d 262 (1968), paragraph two of the syllabus. As a result, "a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997). This tenet, furthermore, has been recurrently employed by this Court for almost seventy-five years. *See Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 104, 38 N.E.2d 403, 22 O.O. 63 (1941); *MacDonald v. Bernard*, 1 Ohio St.3d 85, 89, 438 N.E.2d 410, 1 OBR 122 (1982); *Accord Wilson v. Kasich*, 134 Ohio St.3d 221, 231, 2012-Ohio-5367, 981 N.E.2d 814.

This Court has also repeatedly adopted that approach in trying to achieve the overriding goals of the General Assembly. "Statutes must be construed, if possible, to operate sensibly and not to accomplish foolish results." *State ex rel. Saltsman v. Burton*, 154 Ohio St. 262, 268, 95 N.E.2d 377, 43 O.O. 136 (1950). So "[i]n determining the intention of the General Assembly as to the meaning and operation of statutes, a court, if possible, should avoid absurd and grotesque results." *State v. Nickles*, 159 Ohio St. 353, 112 N.E.2d 531, 50 O.O. 322 (1953), paragraph one of the syllabus. As a result, "[t]he General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes must be construed so as to prevent such results." *State ex rel. Haines v. Rhodes*, 168 Ohio St. 165, 151 N.E.2d 716, 5 O.O.2d 467 (1958), paragraph two of the syllabus. This Court, therefore, stated that "[i]t is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result." *Mishr v. Bd. of Zoning Appeals*, 76 Ohio St.3d 238, 240, 667 N.E.2d 365 (1996). *See also*, *State ex rel. Cooper v. Savord*, 153

Ohio St. 367, 371, 92 N.E.2d 390, 41 O.O. 396 (1950); *State v. Arnold*, 61 Ohio St.3d 175, 178-179, 573 N.E.2d 1079 (1991).

In fact, Chief Justice John Marshall held that the context of what a statute seeks to accomplish takes primacy in determining what the legislature's intent was and when absurd results occur from a literal reading of the statute, the context that surrounded the statute should control over the plain words.

> Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.
>
> *Sturges v. Crowninshield*, 17 U.S. 122, 202-203, 4 L.Ed. 529, 4 Wheat. 122 (1819).

Indeed, this approach of Chief Justice Marshall had been one that he, and the court, had been formulating for a decade before *Sturges*. *See Oneale v. Thornton*, 10 U.S. 53, 68, 3 L.Ed. 150, 6 Cranch 53 (1810). *See also*, *United States v. Palmer*, 16 U.S. 610, 631, 4 L.Ed. 471, 3 Wheat. 610 (1818).

Marshall's rationale, moreover, has been widely followed by the Supreme Court of United States since that time. The reason being that "[s]tatutory construction 'is a holistic endeavor.'" *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). As well as the fact that, "[t]he decisions of [the U.S. Supreme] Court have repeatedly warned against the dangers of an

approach to statutory construction which confines itself to the bare words of a statute." *Lynch v. Overholser*, 369 U.S. 705, 710, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962). The absurdity of a myopic, literalist reading of any questioned statute is, thus, eschewed to reach the marrow of the legislature's intent.

The Supreme Court of the United States has continued to hold stalwart to that principle. "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Sorrells v. United States*, 287 U.S. 435, 446, 53 S.Ct. 210, 77 L.Ed. 413 (1932). The rationale for that principle is that "[t]he reason of the law in such cases should prevail over the letter." *United States v. Kirby*, 74 U.S. 482, 487, 19 L.Ed. 278, 7 Wall. 482 (1869). *See also*, *Baender v. Barnett*, 255 U.S. 224, 226, 41 S.Ct. 271, 65 L.Ed. 597 (1921). In fact, "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 36 L.Ed. 226 (1892). *See also*, *Markham v. Cabell*, 326 U.S. 404, 409, 66 S.Ct. 193, 90 L.Ed. 165 (1945); *NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 72, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964); *Muniz v. Hoffman*, 422 U.S. 454, 469, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975).

Of note, the Supreme Court of the United States has departed from a literal reading of a statute even when it "would compel an odd result", which is in line with the Court's goal of realizing the true intent of the questioned statute. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989). As was

explained by the Supreme Court some years before, "even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). *See also*, *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966). Sometimes, the best way to be loyal to the will of the legislature is not so much to limit review to what the legislature wrote, but what it meant. This is one of those times.

Here, the Sixth District and Gonzales want to create the type of result that the aforementioned cases have counseled against. They want the word "cocaine" to supplant the essential element of the offense in which the word "cocaine" is used to describe the "drug involved" as "a compound, mixture, preparation, or substance containing cocaine." *See* R.C. 2925.11(C)(4). Indeed, that type of statutory torsion by the appellate court illustrates why this Court has held previously—in a similar scenario—that "[t]he construction for which the appellant contends is too narrow and illustrates the vice that arises from picking out a word or words from an enactment, attaching peculiar significance to the selected language and making it controlling in the interpretation at all hazards. The spirit or the intention of the law must prevail over the letter ***." *State ex rel. Henry v. Triplett*, 134 Ohio St. 480, 484, 17 N.E.2d 729, 13 O.O. 53 (1938). In that case, this Court opted to use a "broad interpretation" to "avoid a statutory construction which would lead to [an] absurd result ***." *Id.*, at 485. This Court should, therefore, (1) affirm that a certified conflict exists, (2) embrace its own precedent—as well as that from the Supreme Court of the United States, (3) adopt the State's sole proposition of

law, and (4) reinstate Gonzales's original conviction and sentence. For the General Assembly never intended for the statute(s) in question to be construed in the way that the Sixth District construed it. Looking at the statute as a whole, it can be discerned that this is a textbook example of scrivener's error.

C. The Evolution of R.C. 2925.11 over the Last Twenty Years

For the purposes of this case, R.C. 2925.11 has had three major changes, as it relates to the penalty enhancement for possession of a drug involving cocaine and the total weight of the drug involved, over the past twenty years. The Sixth District spoke to two of them, but they left out the critical middle step, which causes problems when attempting to follow the will of the General Assembly in drug possession cases.

As was noted by the Sixth District, before 1995, the "bulk amount" of a "controlled substance" included "[a]n amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance which is, or which contains any amount of, a schedule I opiate or opium derivative, or cocaine." R.C. 2925.01(E)(1). *See also*, *State v. Gonzales*, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 46. For the purposes of this case, the statute then had a second form between 1995 and 2011. In 1995, S.B. 2 treated cocaine as separate from the standard bulk definition and treated powder cocaine prosecutions different from crack cocaine prosecutions. That ended in 2011 when H.B. 86 removed the distinction between powder and crack cocaine. *See State v. Bielecki*, 11th Dist. Trumbull No. 2011-T-0087, 2012-Ohio-2124, ¶ 43. Betwixt those pieces of legislation cocaine under R.C. 2925.01(X) and crack cocaine under R.C. 2925.01(GG) had different definitions, which no longer exists. And R.C. 2925.11(A) and (C)(4)(f) read differently as well.

Before S.B. 2 in 1995, R.C. 2925.11(A) and (C)(4)(f) stated the following:

> (A) No person shall knowingly obtain, possess, or use a controlled substance.
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:
>
> (f) If the amount of the drug involved exceeds one thousand grams of cocaine that is not crack cocaine or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

Now, after H.B. 86, R.C. 2925.11(A) and (C)(4)(f) state the following:

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:
>
> (f) 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.

The only differences are the following:

1. Now, in (A), a person also violates the statute for possession of a controlled substance analog.

2. Now, in (C), the drug involved "equals or exceeds" instead of "exceeds"

3. Now, in (f), "one thousand grams of cocaine that is not crack cocaine or exceeds one hundred grams of crack cocaine" was replaced by "one hundred grams of cocaine".

4. Now, in (f), the former language referring to R.C. 2929.14(D)(3)(b) has been removed.

Absent that, they remain identical.

Yet when the statute was amended, the drafters made a probable slight *faux pas*. Instead of changing the language of R.C. 2925.11(C)(4) to match the other drug possession offenses where the form of the drug is immaterial—like certain schedule I or II drugs in R.C. 2925.11(C)(1); schedule III, IV, or V drugs in R.C. 2925.11(C)(2); marihuana in R.C. 2925.11(C)(3); heroin in R.C. 2925.11(C)(6); or a controlled substance analog in R.C. 2925.11(C)(8)—the drafters kept the language from where the form of the drug involved is material, like L.S.D. in R.C. 2925.11(C)(5) and hashish in R.C. 2925.11(C)(7).

The words "of cocaine" in R.C. 2925.11(C)(4)(a)-(f) are a holdover from the days when the type of cocaine that was being prosecuted was material. Those days are past. The Sixth District in *Gonzales* viewed "of cocaine" in R.C. 2925.11(C)(4)(a)-(f), to be a clarion call for purity testing. That just isn't so. This statute has never been read—in its various forms—to intimate that in the slightest. It only concerns aggregate weight. To read the statute in any other way belies the legislative intent of the law.

It is also important to note that, by implication, the Sixth District has changed how the words "of cocaine" are viewed under the drug trafficking statute as well. Specifically, R.C. 2925.03(C)(4)(c)-(g), much like R.C. 2925.11(C)(4)(a)-(f) utilizes the same language and went through the same changes during the same times that the drug possession statute was changed. Again, the legislative markers were S.B. 2 in 1995 and H.B. 86 in 2011. And R.C. 2925.03, taken as a whole, is structured just like R.C. 2925.11. So all crimes for the drug trafficking statute, thus, are reduced to either felonies of the fourth degree or felonies of the fifth degree, depending on whether the drug trafficking occurred at or near a school. See R.C. 2925.03(C)(4)(a)-(b).

D. Purity of the Drug Involved Under R.C. 2925.11 Has Never Been Required

No matter what drug is prosecuted under R.C. 2925.11, it has never been held that the prosecution must show the purity of the drug involved. Only the aggregate amount of the "drug involved" is material to determining its weight.

That holds true for possession of drugs that contain some amount of powder cocaine. *State v. Fuller*, 1st Dist. Hamilton No. C-960753, 1997 Ohio App. LEXIS 4398 (Sept. 26, 1997); *State v. Smith*, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 11-15; *State v. Miller*, 2nd Dist. Montgomery No. 13121, 1993 Ohio App. LEXIS 3806 (July 30, 1993); *State v. Barker*, 2nd Dist. Montgomery No. 12732, 1992 Ohio App. LEXIS 311 (Jan. 30, 1992); *State v. Combs*, 2nd Dist. Montgomery No. 11949, 1991 Ohio App. LEXIS 4277 (Sept. 10, 1991); *State v. Brown*, 107 Ohio App.3d 194, 202, 668 N.E.2d 514 (3rd Dist. 1995); *State v. Napper*, 3rd Dist. Marion No. 9-91-1, 1991 Ohio App. LEXIS 5746 (Nov. 27, 1991); *State v. Neal*, 3rd Dist. Hancock No. 5-89-6, 1990 Ohio App. LEXIS 2937 (June 29, 1990); *State v. Remy*, 4th Dist. Ross No. 03CA2731,

2004-Ohio-3630, ¶ 48-53; *State v. Bledsoe*, 5th Dist. Stark No. 2003CA00403, 2004-Ohio-4764, ¶ 15; *State v. Chandler*, 157 Ohio App.3d 672, 683-685, 2004-Ohio-3436, 813 N.E.2d 65 (5th Dist.); *State v. Woodland*, 8th Dist. Cuyahoga No. 84774, 2005-Ohio-1177, ¶ 11; *State v. Morris*, 8th Dist. Cuyahoga No. 67401, 1995 Ohio App. LEXIS 4289 (Sept. 28, 1995); *State v. Brooks*, 8th Dist. Cuyahoga No. 50384, 1986 Ohio App. LEXIS 5735 (Feb. 27, 1986); *State v. Suarez*; *State v. Coca*, 10th Dist. Franklin Nos. 81AP-723, 81AP-724, 1981 Ohio App. LEXIS 10309 (Dec. 31, 1981); *State v. Anderson*, 12th Dist. Fayette No. CA2008-07-026, 2009-Ohio-2521, ¶ 22-23, 29-30.

That holds true for possession of drugs that contain some amount of crack cocaine. *State v. Freeman*, 138 Ohio App.3d 408, 416-417, 741 N.E.2d 566 (1st Dist. 2000); *State v. Hodge*, 2nd Dist. Montgomery No. 23964, 2011-Ohio-633, ¶ 45-47; *State v. Moore*, 2nd Dist. Montgomery No. 21863, 2007-Ohio-2961, ¶ 8; *State v. Jones*, 7th Dist. Mahoning No. 06 MA 17, 2007-Ohio-7200, ¶ 21-23, 25, 29, 35-36, 41; *State v. Burrell*, 8th Dist. Cuyahoga No. 86702, 2006-Ohio-2593, ¶ 2-3; *State v. Alexander*, 8th Dist. Cuyahoga No. 85688, 2005-Ohio-5200, ¶ 44-46; *State v. Troutman*, 9th Dist. Lorain No. 12CA010223, 2013-Ohio-4559, ¶ 19-20; *State v. Seymour*, 9th Dist. Lorain No. 12CA010250, 2013-Ohio-1936, ¶ 6-7, 11-12; *State v. Siggers*, 9th Dist. Medina No. 09CA0028-M, 2010-Ohio-1353, ¶ 15-20; *State v. Ferguson*, 10th Dist. Franklin No. 13AP-891, 2014-Ohio-3153, ¶ 24-26; *State v. Banks*, 182 Ohio App.3d 276, 281-282, 2009-Ohio-1892, 912 N.E.2d 633 (10th Dist.); *State v. Bielicki*, 11th Dist. Trumbull No. 2011-T-0087, 2012-Ohio-2124, ¶ 45-53.

That holds true for possession of drugs that contain some amount of marijuana. *State v. Davis*, 16 Ohio St.3d 34, 476 N.E.2d 655 (1985); *State v. Wolpe*, 11 Ohio St.3d

50, 51-52, 463 N.E.2d 384 (1984); *State v. Jarrells*, 72 Ohio App.3d 730, 733, 596 N.E.2d 477 (2nd Dist. 1991); *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 30-32; *State v. Hunter*, 5th Dist. Licking No. 99CA0036, 1999 Ohio App. LEXIS 3870 (Aug. 19, 1999); *State v. West*, 8th Dist. Cuyahoga Nos. 97398, 97899, 2012-Ohio-6138, ¶ 51-58; *State v. Rotaru*, 8th Dist. Cuyahoga No. 56499, 1990 Ohio App. LEXIS 160 (Jan. 25, 1990); *State v. Hartkemeyer*, 12th Dist. Warren No. CA2014-01-008, 2014-Ohio-3560, ¶ 10-14.

That holds true for possession of other scheduled drugs. *State v. Colbert*, 1st Dist. Hamilton No. C-880471, 1990 Ohio App. LEXIS 792 (Mar. 7, 1990) (oxycodone); *State v. Baxla*, 4th Dist. Ross No. 1356, 1988 Ohio App. LEXIS 90 (Jan. 19, 1988) (Diazepam); *State v. Samatar*, 152 Ohio App.3d 311, 334-336, 2003-Ohio-1639, 787 N.E.2d 691 (10th Dist.) (cathinone).

For that matter, the same holds true for trafficking in drugs as well. *State v. Hall*, 5th Dist. Licking No. CA-2736, 1981 Ohio App. LEXIS 11133 (Apr. 3, 1981); *State v. Little*, 8th Dist. Cuyahoga No. 77258, 2000 Ohio App. LEXIS 4779 (Oct. 12, 2000); *State v. Long*, 8th Dist. Cuyahoga No. 77272, 2000 Ohio App. LEXIS 4778 (Oct. 12, 2000).

Again, courts look solely at the aggregate weight of the drug involved when it was weighed. As the above cases illustrate, things like cutting agents, moisture, or stalks—depending on the drug involved—have all been included in the weight of the drug involved for prosecution, conviction, and sentence. And also as shown above, purity of the drug involved is never required to be proven at trial because—quite frankly—the statute doesn't require it.

That approach, furthermore, is almost universally accepted on a national level from coast to coast—including, to a large extent, on the federal level. For the purposes of this case, cocaine (whether powder or crack) is weighed in its aggregate form in 48 states. *See* Code of Ala. § 13A-12-211(c)(1), 13A-12-212; Alaska Stat. § 11.71.040(a)(3)(C); Ariz. Rev. Stat. Ann. § 13-3401, 13-3407, 13-3408; Ark. Code Ann. § 5-64-419, 5-64-420; Cal. Health & Saf. Code § 11350-11352, 11054(f)(1); Colo. Rev. Stat. § 18-18-403.5-405; Conn. Gen. Stat. § 21a-278(a), 21a-279(a); Del. Code Ann. tit. 16 § 4716(b)(4), 4751C(1)(a); Fla. Stat. § 893.13(1)(b), 893.135(1)(b)(1); Haw. Rev. Stat. § 712-1240—712-1243; Idaho Code § 37-2732, 37-2732(B); 720 Ill. Comp. Stat. 570/401-402; Ind. Code § 35-48-4-1, 35-48-4-6; Iowa Code § 124.401; Kan. Stat. Ann. § 21-5705, 5706; Ky. Rev. Stat. Ann. § 218A.010, 218A.1412, 218A.1415; La. Stat. Ann. § 40:967; Me. Stat. tit. 17-A § 1102-1107; Md. Code Ann., Criminal § 5-101(g)(1), 5-403(b)(3), 5-601—613; Mass. Gen. Laws. Ch. 94C § 31-32E; Mich. Comp. Laws § 333.7401-7403; Minn. Stat. § 152.01(3a), 152.021(2)(a)(1-4); Miss. Code Ann. § 41-29-139(c); Mo. Rev. Stat. § 195.222(2); Mont. Code Ann. § 45-9-101, 45-9-102; Neb. Rev. Stat. § 28-416(8); Nev. Rev. Stat. § 456.3395, 453.336-337; N.H. Rev. Stat. Ann. § 318-B:2, 318-B:26; N.J. Stat. Ann. § 2C:35-5(b), 2C:35-10; N.M. Stat. Ann. § 30-31-20—23; N.C. Gen. Stat. § 90-95(h)(3); N.D. Cent. Code § 19-03.1-23.1(1)(c)(2); Okla. Stat. tit. 63 § 2-401(C)(3)(b), 2-415(C)(2); Or. Rev. Stat. § 475.005(6)(a), 475.900, 475.925; 18 Pa. Cons. Stat. § 7508(a)(3)(i), 35 Pa. Cons. Stat. § 780-113; 21 R.I. Gen. Laws § 28-401.1, 28-401.2; S.C. Code Ann. § 44-53-370, 44-53-375, 44-53-392; S.D. Codified Laws § 22-42-2; Tenn. Code Ann. § 39-17-417; Tex. Health & Safety Code § 481.112, 481.115; Utah Code Ann. § 58-37-8; Vt. Stat. Ann. tit. 18 § 4231; Va. Code Ann. § 18.2-248(C),

18.2-250; Wash. Rev. Code § 69.50.101(z); W.Va. Code R. § 60A-4-401; Wis. Stat. § 961.16, 961.41; and Wyo. Stat. Ann. § 35-7-1031(d).

There are two states that in certain circumstances do a purity test for cocaine, New York and Georgia. As it relates to New York, a purity determination is required when the drug containing cocaine weighs more than 500mg but less than one-eighth of an ounce. *See* N.Y. Penal Law § 220.06, 220.09. Once the drug involved containing cocaine has more than one-eighth of an ounce, the drug is weighed in the aggregate. This applies to both possession and trafficking of a drug containing some amount of cocaine. *See* N.Y. Penal Law § 220.09, 220.16, 220.18, 220.21, 220.39, and 220.41. Oppositely in Georgia, if the drug involved containing cocaine is less than 28 grams, it is weighed in the aggregate; however, if it is 28 grams or more, the mixture needs to contain cocaine with a purity of at least ten percent. *See* Ga. Code Ann. § 16-13-30 and 16-30-31.

In the federal system, a purity determination is not needed for convictions of possession or trafficking of drugs containing some amount of cocaine; the offense is determined by the aggregate weight of the drug. 21 USCS § 812(a)(4); 21 USCS § 841. But it is used to make an upward departure from the sentencing guidelines. 21 U.S.S.G. § 2D1.1. Yet that approach is not uniform, for a majority of courts have held that a purity determination is immaterial for departing from the guidelines when sentencing drug dealers. *See e.g.*, *United States v. Limberopoulos*, 26 F.3d 245, 252-253 (1st Cir. 1994); *United States v. Whitehead*, 849 F.2d 849, 859-860 (4th Cir. 1988); *United States v. Taylor*, 868 F.2d 125, 127 (5th Cir. 1989); *United States v. Elrod*, 898 F.2d 60, 61-62 (6th Cir. 1990); *United States v. Blythe*, 944 F.2d 356, 362-363 (7th Cir. 1991); *United States v. Bishop*, 894 F.2d 981, 986 (8th Cir. 1990); *United States v. Hoyt*, 879 F.2d 505, 512 (9th

Cir. 1989); *United States v. Larsen*, 904 F.2d 562, 563 (10th Cir. 1990); *United States v. Holmes*, 838 F.2d 1175, 1177-1178 (11th Cir. 1988).

Here, the weight of the drug involved (excluding the clear plastic bag it came in) weighed over 100 grams, and it contained some measurable amount of cocaine. Trial Transcript November 5, 2013, at 190-191; Trial Transcript November 6, 2013, at 42, 48, 52, 68-69; Exhibit 3. *Accord State v. Gilliam*, 192 Ohio App.3d 145, 150-151, 2011-Ohio-26, 948 N.E.2d 482 (2nd Dist.); *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, at the syllabus; *Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 338-339, 2010-Ohio-2449, 933 N.E.2d 1063. So again, the Sixth District changed the landscape, as it relates to the prosecution of any drug offense involving cocaine. Under the guise of "statutory construction", the court made it so today's Major Drug Offender is now entitled to a fifth-degree felony, even if that person fills a warehouse with his or her drugs. For it reduced a Major Drug Offender's statutorily-required, mandatory, maximum sentence of 11 years in prison to a maximum sentence of a mere 12 months. The reason for that troubling result is that no lab in Ohio does a purity/quantitative analysis of drugs; rather, they do an aggregate/qualitative analysis of the drugs. And that protocol is sound because every other court in Ohio—indeed almost every other jurisdiction nationwide—has held that as long as there is a detectible amount of the drug involved, the aggregate weight of the substance determines the level of the offense and the resulting penalty.

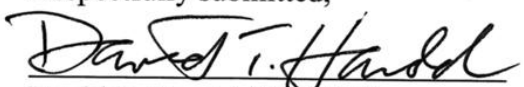
The Sixth District, therefore, acted improperly when it reduced Gonzales's sentence from a felony of the first degree to a felony of the fifth degree. To keep the

Sixth District's opinion intact creates an absurd result, as it relates to the will of the General Assembly, that statutory construction assiduously tries to avoid.

CONCLUSION

This Court should reverse the decision of the Sixth District Court of Appeals and reinstate the verdict of the trial court.

Respectfully submitted,



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Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and accurate copy of the foregoing (with the attached appendix) was served via first class U.S. Mail to counsel for Defendant-Appellee, Attorney Andrew R. Mayle, Mayle Ray & Mayle LLC, 210 South Front Street, Fremont, Ohio 43420, as well as to the following individuals and organizations: Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Eric E. Murphy, State Solicitor, counsel for *amicus curiae* Ohio Attorney General Michael DeWine, Office of Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; Daniel T. Van, Assistant Prosecutor, counsel for *amicus curiae* Ohio Prosecuting Attorney's Association, Cuyahoga County Prosecutor's Office, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, on this 2nd day of October, 2015.

David T. Harold (0072338)
Assistant Prosecuting Attorney

APPENDIX

Notice of Appeal..... 1

Notice of Certified Conflict..... 3

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461... 6

Judgment Entry, *State v. Gonzales*, Wood C.P. No. 12-CR-412 (Nov. 14, 2013)..... 32

State v. Smith, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568..... 38

R.C. 2925.11..... 50

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, -vs- RAFAEL GONZALES, Defendant-Appellee.	))))))))))))	Sup. Ct. No. 15-0385 Ct. App. No. WD-13-086 On Appeal from the Wood County Court of Appeals, Sixth Appellate District

PLAINTIFF-APPELLANT, STATE OF OHIO'S NOTICE OF APPEAL

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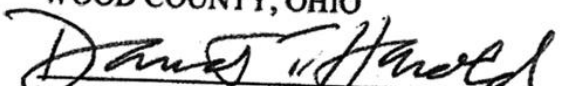
RECEIVED
MAR 06 2015
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 06 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Now comes Plaintiff-Appellant, the State of Ohio (the "**State**"), by and through the undersigned counsel, and appeals from the Decision and Judgment Entry journalized by the Sixth District Court of Appeals on February 6, 2015 in *State v. Gonzales* (6th Dist. Wood No. WD-13-086, 2015-Ohio-461), a copy of which is attached hereto. This case involves a felony, raises a question of public or great general interest. The State will be filing a separate memorandum in support of jurisdiction with the records of this Honorable Court.

Respectfully submitted,

PAUL A. DOBSON, PROSECUTOR
WOOD COUNTY, OHIO



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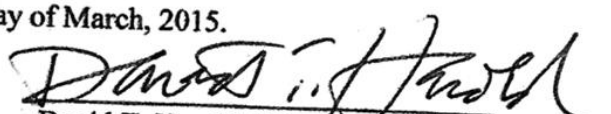
CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and accurate copy of this notice of appeal was served via regular U.S. Mail to counsel for Defendant-Appellee Rafael Gonzales's attorney Andrew R. Mayle, Mayle Ray & Mayle LLC, 210 South Front Street, Fremont, Ohio 43420 on this 5th day of March, 2015.



David T. Harold (0072338)
Assistant Prosecuting Attorney

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, -vs- RAFAEL GONZALES, Defendant-Appellee.	)	Sup. Ct. No. 15-0384 Ct. App. No. WD-13-086 On Appeal from the Wood County Court of Appeals, Sixth Appellate District

NOTICE OF CERTIFIED CONFLICT

FILED
MAR 06 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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NOTICE OF CERTIFIED CONFLICT

The State of Ohio hereby gives notice that on February 6, 2015, the Sixth Appellate District found that its holding in this case conflicted with the holding of *State v. Smith*, 2nd Dist. Greene No. 2010-CA-36, 2011-Ohio-2568 and certified the following question for review by this Court:

> Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture?

State v. Gonzales, 6th Dist. Wood No. WD-13-086, 2015-Ohio-461, ¶ 58.

A copy of the Decision and Judgment dated February 6, 2015, certifying the conflict, is attached as Exhibit 1. The Judgment Entry of the Second District is attached as Exhibit 2.

Respectfully submitted,

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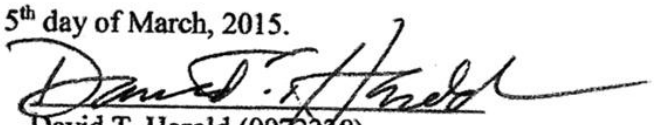
CERTIFICATE OF SERVICE

The undersigned counsel certifies that a true and accurate copy of this notice of certified conflict was served via regular U.S. Mail to counsel for Defendant-Appellee Rafael Gonzales's attorney Andrew R. Mayle, Mayle Ray & Mayle LLC, 210 South Front Street, Fremont, Ohio 43420 on this 5th day of March, 2015.



David T. Harold (0072338)
Assistant Prosecuting Attorney

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SIXTH DISTRICT
COURT OF APPEALS
CINDY A. HOFNER, CLERK

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio

Appellee

v.

Rafael Gonzales

Appellant

Court of Appeals No. WD-13-086

Trial Court No. 12 CR 412

DECISION AND JUDGMENT

Decided: FEB 06 2015

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney,
and David T. Harold, Assistant Prosecuting Attorney, for appellee.

Andrew R. Mayle, Jeremiah S. Ray and Ronald J. Mayle,
for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Rafael Gonzales, appeals the judgment of the Wood County Court of Common Pleas, sentencing him to eleven years in prison following a jury trial in which he was found guilty of possession of cocaine with a major drug offender specification. We affirm, in part, and reverse, in part.

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A. Facts and Procedural Background

{¶ 2} This matter arises from appellant's purchase of cocaine from a confidential informant, Saul Ramirez, on July 26, 2012. On the day of the transaction, Ramirez recorded a telephone conversation with appellant during which appellant agreed to meet with Ramirez in order to purchase cocaine. Appellant proceeded to meet with Ramirez at a Meijer parking lot in Wood County, Ohio, so that he could inspect the drugs prior to making the purchase. During the meeting, appellant tested the quality of the cocaine, negotiated a price, and scheduled a time for the two to meet in order to complete the transaction. Appellant and Ramirez agreed to meet at a Super 8 motel located along I-280 in Wood County.

{¶ 3} Later in the afternoon, appellant arrived at the motel and was instructed to meet Ramirez in room 105. After arriving and meeting with Ramirez, appellant became upset because Ramirez would not produce the cocaine until appellant presented the purchase money. Eventually, appellant displayed $58,000 in cash, an amount sufficient to purchase two kilograms of cocaine. Thereafter, an undercover officer posing as a truck driver entered the room with two kilograms of cocaine. The first kilogram, later admitted at trial as exhibit No. 3, consisted of manufactured cocaine surrounding a baggie containing genuine cocaine weighing 139 grams. The baggie was separately admitted at trial as exhibit No. 13. The second kilogram, admitted at trial as exhibit No. 4, contained a tracking device planted inside the manufactured cocaine. After the money was counted, appellant took possession of the two kilograms of cocaine and departed.

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COURT OF APPEALS
FEB - 6 2015

{¶ 4} Appellant was subsequently arrested, after which the drugs were seized by the arresting officers and tested by the Ohio Bureau of Criminal Investigation (BCI). The BCI test confirmed that the substance contained inside exhibit No. 13 was indeed cocaine. However, the BCI analyst that performed the test was unavailable to testify at trial. Consequently, the test results were not admitted at trial. Nonetheless, the state retested the substance on November 1, 2013, four days prior to trial. The results of the test were provided to appellant. However, because appellant was given the test results only a short time prior to trial, the trial court excluded the second BCI report and both test results out of concern that their use at trial would violate Crim.R. 16(K).

{¶ 5} On August 1, 2012, appellant was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(4)(f). The indictment also included a major drug offender specification pursuant to R.C. 2929.01 based on the allegation that the amount of cocaine equaled or exceeded 100 grams.

{¶ 6} Appellant subsequently entered a plea of not guilty. Following pretrial discovery, a jury trial commenced on November 5, 2013. During the trial, the state solicited testimony from several witnesses, including Ramirez and numerous law enforcement officers. Appellant's primary argument at trial centered on the state's failure to establish that the substance seized from appellant was cocaine. While the state was not permitted to utilize the BCI test results to identify the seized substances as cocaine, several witnesses, including Ramirez, stated that the substance was cocaine based on their experience with the drug. Specifically, Ramirez conducted a visual and

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FEB - 6 2015

olfactory examination of the substance contained in exhibit No. 13. Based on his examination, Ramirez testified that the substance was, in fact, cocaine. Later in the trial, the state called Mark Denomy, the officer who prepared exhibit No. 13. Denomy indicated that he had participated in hundreds of cocaine operations. He went on to describe the characteristics of cocaine, noting that it has a distinct smell that makes it readily identifiable. Ultimately, Denomy stated that exhibit No. 13 contained cocaine. Moreover, the lead investigator on this case, Mark Apple, stated that exhibit No. 13 contained cocaine. Apple smelled the cocaine, after which he testified: "There is a definite odor to cocaine and exhibit 13 did have that odor."

{¶ 7} At the conclusion of the evidence, the jury found appellant guilty of possession of cocaine. Additionally, the jury found that appellant possessed an amount of cocaine that equaled or exceeded 100 grams. The trial court immediately proceeded to sentencing, where it sentenced appellant to 11 years in prison and imposed a $15,000 fine. Appellant's timely appeal followed.

B. Assignments of Error

{¶ 8} On appeal, appellant asserts the following assignments of error for our consideration:

I. The trial court erred in permitting law-enforcement officers to identify the disputed substance as "cocaine" in the absence of any scientific testing or expert reports prepared by the officers and timely disclosed under Crim.R. 16(K).

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COURT OF APPEALS
FEB - 6 2015

II. The trial court erred in letting this case go to the jury when there was not sufficient, competent evidence identifying the disputed substance as "cocaine" as defined by R.C. 2925.01(X).

III. The trial court erred in refusing to instruct the jury on the definition of "cocaine" set forth in R.C. 2925.01(X).

IV. Because there is no evidence in this case as to the weight of actual cocaine involved, the trial court erred by allowing the jury to consider the entire weight of the disputed substance in determining whether Mr. Gonzales possessed more than 100 grams of "cocaine."

V. The trial court erred in permitting the state to enlarge its bill of particulars after trial started while simultaneously refusing to give an "other bad acts" limiting instruction, which together violated Gonzales's double jeopardy, grand-jury presentment, and due process rights guaranteed under the Ohio and United States Constitutions.

II. Analysis

A. Drug Identification Testimony

{¶ 9} In appellant's first assignment of error, he argues that the trial court erred in allowing the state's witnesses to identify the substance contained in exhibit No. 13 as cocaine without first requiring the state to certify the witnesses as experts and comply with the mandates of Crim.R. 16(K). Moreover, appellant's second assignment of error alleges that the trial court erred in submitting this case to the jury where there was

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COURT OF APPEALS
FEB - 6 2015

insufficient evidence to establish that exhibit No. 13 contained cocaine under R.C. 2925.01(X). Because these assignments of error are interrelated, we will address them simultaneously.

{¶ 10} When reviewing a challenge to the sufficiency of the evidence, we must determine whether the evidence admitted at trial, "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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 11} In the present case, appellant argues that the state failed to identify the cocaine through the use of admissible testimony. While he acknowledges that the cocaine was identified by Ramirez and several police officers, appellant argues that the identification testimony was given in the form of expert testimony, which should have been excluded since the state failed to comply with Crim.R. 16(K). Indeed, appellant contends that the cocaine could *only* have been identified through the use of expert

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COURT OF APPEALS
FEB - 6 2015

testimony given the technical nature of the statutory definition of cocaine under R.C. 2925.01(X).

{¶ 12} We begin our analysis of appellant's first and second assignments of error by examining whether expert testimony is required to identify a substance as "cocaine," as that term is defined in R.C. 2925.01(X). R.C. 2925.01(X) defines cocaine as follows:

{¶ 13} "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.

{¶ 14} Given the technical nature of the definition of cocaine, appellant urges us to "hold that scientific testimony is required to identify powder cocaine under the circumstances of this case." Appellant asserts that this issue has not been addressed by the Supreme Court of Ohio. Thus, in support of his argument, appellant points to a

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FEB - 6 2015

7.

decision from the Supreme Court of North Carolina entitled *State v. Llamas-Hernandez*, 363 N.C. 8, 673 S.E.2d 658 (2009).

{¶ 15} In *Llamas-Hernandez*, the defendant was convicted of trafficking in cocaine by possession of 28 grams or more. Llamas-Hernandez's conviction arose from a meeting with a confidential informant, at which he offered to sell the informant one kilogram of cocaine. Immediately after the offer was made, the informant left the meeting and contacted the police. *State v. Llamas-Hernandez*, 189 N.C.App. 640, 642, 659 S.E.2d 79 (2008). Soon thereafter, police officers arrived on the scene and executed a search warrant, ultimately discovering one kilogram of white powder. Consequently, the white powder was tested and determined to be cocaine. Llamas-Hernandez was charged, in a separate case, with trafficking in cocaine. As a result of the chemical analysis test, Llamas-Hernandez pleaded guilty. *Id.* at 643.

{¶ 16} Following the discovery of the kilogram of cocaine, officers conducted a second search at Llamas-Hernandez's apartment with the consent of a cotenant. During their search of the apartment, officers opened the door to a linen closet, where they discovered a white powdery substance weighing 55 grams. This substance was tested and found to contain cocaine, but the report was not admitted at trial. Nonetheless, Llamas-Hernandez was charged with trafficking in cocaine relating to the 55 grams of cocaine, and a trial ensued. *Id.*

{¶ 17} At trial, the state utilized the testimony of its investigating officers to identify the white powdery substance that was found in Llamas-Hernandez's apartment.

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

Upon questioning, the officers identified the substance as cocaine. The officers based their conclusions with respect to the identity of the substance on visual inspections. Llamas-Hernandez objected to the use of such testimony, arguing that it was improper for a lay witness to identify cocaine given the technical description of cocaine under N.C.G.S. § 90-90(1)(d).[1] The trial court overruled the objection, and the state was permitted to proceed. Llamas-Hernandez was subsequently found guilty of trafficking in cocaine.

{¶ 18} Llamas-Hernandez timely appealed his conviction, arguing that the trial court erred in allowing the state to identify the disputed substance as cocaine through the use of lay witness officer testimony. A divided panel of the Court of Appeals of North Carolina affirmed the conviction. In their decision, the majority relied upon its prior decision in *State v. Freeman*, 185 N.C.App. 408, 648 S.E.2d 876 (2007), which held that lay opinion testimony from a police officer was admissible to identify pills found on a defendant as crack cocaine. *State v. Llamas-Hernandez*, 189 N.C.App. at 644, 659 S.E.2d 79.

---

[1] N.C.G.S. § 90-90(1)(d) describes cocaine as follows:

> Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

{¶ 19} Notwithstanding the court's decision in *Freeman*, the dissent concluded that police officers should not be allowed to "express a lay opinion as to the chemical composition of a white powder." *Id.* at 650 (Steelman, J., dissenting). The dissent, noting the "technical, scientific definition of cocaine," stated that "the General Assembly intended that expert testimony be required to establish that a substance is in fact a controlled substance." *Id.* at 652. As to the applicability of *Freeman*, the dissent found that the cases were not analogous based, in part, on the chemical differences between crack cocaine (which was at issue in *Freeman*) and powdered cocaine. Moreover, the dissent noted that a laboratory report was admitted in *Freeman* that conclusively established the identity of the crack cocaine. No such report was admitted to establish the identity of the powdered cocaine. Thus, the dissent found that lay witness testimony could not establish the identity of the substance, especially since it lacked any "distinguishing characteristics" upon which to conclude, based only on a visual inspection, that the substance was cocaine. *Id.* at 654 (Steelman, J., dissenting).

{¶ 20} Llamas-Hernandez subsequently appealed the decision of the court of appeals to the North Carolina Supreme Court. In a one-sentence decision, the court stated: "For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed." *Llamas-Hernandez*, 363 N.C. at 8, 673 S.E.2d 658.

{¶ 21} Having examined the facts of *Llamas-Hernandez*, we find that the case is analogous to the facts in the case sub judice. Nevertheless, we disagree with appellant's assertion that the Supreme Court of Ohio has not spoken on the issue of whether a lay

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COURT OF APPEALS
FEB - 6 2015

witness may identify a controlled substance. Indeed, in *State v. McKee*, 91 Ohio St.3d 292, 744 N.E.2d 737 (2001), syllabus, the court stated: "The experience and knowledge of a drug user lay witness can establish his or her competence to express an opinion on the identity of a controlled substance if a foundation for this testimony is first established." The court went on to state that the identification of a controlled substance by a lay witness is not "based on specialized knowledge within the scope of Evid.R. 702, but rather * * * upon a layperson's personal knowledge and experience." *Id.* at 297. Citing Evid.R. 701, the court indicated that, "[a]lthough these cases are of a technical nature in that they allow lay opinion testimony on a subject outside the realm of common knowledge, they still fall within the ambit of the rule's requirement that a lay witness's opinion be rationally based on firsthand observations and helpful in determining a fact in issue."[2] *Id.*

{¶ 22} "A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled." *State v. White*, 2013-Ohio-51, 988 N.E.2d 595, ¶ 201 (6th Dist.), citing *Schlachet v. Cleveland Clinic*, 104 Ohio App.3d 160, 168, 661 N.E.2d 259 (8th Dist.1995). In light of the clear instruction from the Supreme Court of Ohio allowing lay witness identification of controlled substances, we decline to adopt appellant's view, first espoused by the North

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[2] Evid.R. 701 states: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

Carolina Supreme Court in *Llamas-Hernandez*, that expert testimony was required to identify the cocaine in this case.

{¶ 23} For drug identification testimony to be admissible under *McKee*, the state need only establish the competence of the proposed lay witness. Competence is established in this context by "providing the court with a foundation that demonstrates that the lay witness has a sufficient amount of experience and knowledge either from having dealt with or having used the same type of controlled substance in the past that he or she is now being asked to identify." *State v. Maag*, 3d Dist. Hancock No. 5-03-32, 2005-Ohio-3761, ¶ 32, citing *McKee* at 297.

{¶ 24} Here, the state laid a sufficient foundation prior to soliciting drug identification testimony from Ramirez and the officers involved in the controlled buy. Specifically, Ramirez testified that he gained a familiarity with cocaine while trafficking the substance for a 15-year period prior to becoming a confidential informant. When asked whether exhibit No. 13 contained cocaine, Ramirez inspected the substance, using both sight and smell, and identified it as cocaine.

{¶ 25} In addition to Ramirez's identification testimony, the state questioned several officers regarding whether the substance identified as exhibit No. 13 was in fact cocaine. First, the state called Denomy, who stated that he had extensive experience with cocaine, having participated in hundreds of cocaine operations. When asked to describe the appearance of cocaine, Denomy stated:

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

Cocaine is a white powder, usually it has a flake to it. Usually you can tell the better cocaine by the color like a fish scale almost. Usually the fake looking cocaine doesn't have that to it. It's easier for me to identify it by the smell than the look. There's a certain chemical odor to it that once you smell cocaine it's a consistent you never really forget.

{¶ 26} The state then presented Denomy with exhibit No. 13, which Denomy identified as cocaine.

{¶ 27} Following Denomy's testimony, the state called Mark Ellinwood, who has been employed as a special agent with BCI for 17 years. Ellinwood was the officer who prepared exhibit No. 13 for sale to appellant. Prior to identifying exhibit No. 13 as cocaine, Ellinwood explained that he had "years of experience, approximately 24 years experience handling a canine that also involves handling drugs on a weekly or daily basis for training, whether it's cocaine, crack cocaine, heroin, the various drugs. I'm very familiar with what cocaine looks like."

{¶ 28} Later in the trial, the state called Kip Lewton, who was involved in this case while working as an agent for the DEA. Lewton explained that he was familiar with cocaine as a result of his history in law enforcement spanning several decades. During that time, Lewton was involved in the undercover purchase of drugs. When asked what types of drugs he would generally purchase, he answered: "Predominantly cocaine, marijuana, little bit of heroin, those are the three primary drugs." He went on to describe cocaine, stating:

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

Cocaine is a powder substance, usually when it's pressed into a kilo it will have a chunky consistency, either solid brick if it's still in the deal or if it's broken off a lot of times they'll adulterate it with cuts depending on then what level that you purchase. And it will have a scaly kind of look to it at times. A certain kind of smell to it kind of like an acetone chemical smell.

It's one of those things once you smell it, it permeated like a skunk; if you drive down the road and smell a skunk you don't see it but you always remember that smell.

{¶ 29} Upon being presented with exhibit No. 13, Lewton identified the substance as "cocaine that was pressed into a brick form. At this point it is kind of breaking apart. It has that smell that I described and chemical smell that I'm familiar with."

{¶ 30} Finally, as its last witness, the state called Apple, who also indicated that exhibit No. 13 contained cocaine. Apple is a special agent with BCI, a position he has held since 1996. While at BCI, Apple has purchased cocaine during undercover operations. While testifying, Apple described cocaine in great detail, stating: "You can tell by looking at, like cocaine for example, the quality of the cocaine based on its texture, based on its coloration, based on the fish scale, people have talked to you about already a shininess that occurs on the cocaine." On cross-examination, Apple was asked why he smelled exhibit No. 13 prior to identifying it, to which he responded: "There is a definite odor to cocaine and exhibit 13 did have that odor."

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COURT OF APPEALS
FEB - 6 2015

{¶ 31} Based upon the foregoing, we find that the witnesses used by the state to identify exhibit No. 13 as cocaine possessed a sufficient amount of experience and knowledge to do so. Indeed, the witnesses each possessed decades of experience either as a trafficker of cocaine or as law enforcement officers.

{¶ 32} Having found the state's drug identification testimony to be admissible in this case, we conclude that a rational trier of fact could have found that the substance contained in exhibit No. 13 was cocaine. Accordingly, appellant's first and second assignments of error are not well-taken.

B. Jury Instructions

{¶ 33} In his third assignment of error, appellant argues that the trial court erred in refusing to instruct the jury on the definition of "cocaine" set forth in R.C. 2925.01(X).

{¶ 34} Generally, requested jury instructions should be given if they are a correct statement of law as applied to the facts of the case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). "[A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Prejudicial error is found in a criminal case where a court refuses to give an instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992). A determination as to jury instructions is a matter left to the sound discretion of the trial court. *Id.* Thus, we review a trial court's decision regarding jury instructions for an abuse of discretion. *State v.*

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COURT OF APPEALS
FEB - 6 2015

Lillo, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15. Abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 35} In the case sub judice, appellant requested that the trial court provide an instruction on the statutory definition of cocaine set forth in R.C. 2925.01(X). In supporting his request, appellant focused on the lack of evidence presented at trial as to the weight of actual cocaine contained in exhibit No. 13. He reasoned that the technical definition of cocaine contained in R.C. 2925.01(X) limited his liability to the weight of the cocaine, apart from the weight of any other substances that were mixed with the cocaine. The trial court considered appellant's argument, but determined that the requested instruction was unnecessary in light of the following instruction regarding the amount of the cocaine involved in this case: "Amount. If your verdict is guilty, you will separately decide beyond a reasonable doubt if the amount of cocaine involved at the time of the offense equaled or exceeded 100 grams. If your verdict is not guilty, you will not decide this issue."

{¶ 36} Having reviewed the instructions that were provided to the jury in this case, we find that the requested instruction would have been superfluous. Importantly, appellant's argument in support of the requested instruction centered on the state's lack of evidence as to the *amount* of cocaine contained in exhibit No. 13. The fact that exhibit No. 13 contained cocaine was clearly established by several of the state's witnesses. What remained at issue was *how much* cocaine appellant possessed and whether the

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

entire weight of the substance should be included in determining whether the amount equaled or exceeded 100 grams. R.C. 2925.01(X) does not speak to this issue. Rather, the relevant statute is R.C. 2925.11(C)(4), the substance of which was already covered in the general charge to the jury. Because the jury instructions adequately informed the jury on the relevant issues in this case, we conclude that the trial court did not abuse its discretion in refusing to provide the requested instruction.

{¶ 37} Accordingly, appellant's third assignment of error is not well-taken.

C. Penalty Enhancement Under R.C. 2925.11(C)(4)(f)

{¶ 38} In appellant's fourth assignment of error, he argues that the trial court erred by allowing the jury to consider the entire weight of exhibit No. 13 in determining whether he possessed 100 or more grams of cocaine.

{¶ 39} The statutory provision relevant to our disposition of appellant's fourth assignment of error is R.C. 2925.11, which states, in relevant part:

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
>
> * * *
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> * * *
>
> (4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

* * *

(f) 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.

{¶ 40} Referring to R.C. 2925.11(C)(4)(f), appellant asserts that only the weight of the actual cocaine contained in exhibit No. 13 should have been considered. We agree.

{¶ 41} At the outset, we note that the plain language of R.C. 2925.11(C)(4) supports appellant's argument. The primary purpose of statutory construction is to give effect to the intention of the General Assembly. *Henry v. Cent. Natl. Bank*, 16 Ohio St.2d 16, 20, 242 N.E.2d 342 (1968), paragraph two of the syllabus. A court must first look to the language itself to determine the legislative intent. *Provident Bank v. Wood*, 36 Ohio St.2d 101, 105, 304 N.E.2d 378 (1973). "If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly." *Id.* at 105-106, citing *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944).

{¶ 42} Here, R.C. 2925.11(C)(4)(f) increases the level of the offense for possession of cocaine when the amount possessed "equals or exceeds one hundred grams

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

of cocaine." (Emphasis added.) The emphasized language clearly modifies the weight in the statute. This becomes even more obvious upon an examination of the manner in which other drugs are treated under R.C. 2925.11. Concerning marihuana, R.C. 2925.11 increases the level of the offense "[i]f the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams." Importantly, the statute does not state 100 or 200 grams *of marihuana*. Further, heroin offenses are amplified under R.C. 2925.11 "[i]f the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams." Once again, the statute does not indicate one gram *of heroin*.

{¶ 43} Having found that the relevant inquiry in determining the level of the offense under R.C. 2925.11(C)(4)(a) through (f) centers on a determination of the amount of actual "cocaine" contained in the mixture, we now turn to the definition of "cocaine" in R.C. 2925.01(X) and 3719.41. Notably, the definition of cocaine differs from that of many other drugs. Most drugs are defined broadly such that a mixture containing the particular drug falls within the definition. For example, "marihuana" is defined as "Any material, compound, mixture, or preparation that contains any quantity of [marihuana]." R.C. 3719.41 (Schedule I(C)(19)). Likewise, R.C. 3719.41 defines lysergic acid diethylamide (LSD) as "Any material, compound, mixture, or preparation that contains any quantity of [LSD]." R.C. 3719.41 (Schedule I(C)(18)). Similarly, the definition of hashish includes "Any material, compound, mixture, or preparation that contains any quantity of [hashish]." R.C. 3719.41 (Schedule I(C)(32)).

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

{¶ 44} Unlike the broad definitions used for marihuana, LSD, and hashish, cocaine is defined under R.C. 3719.41 (Schedule II(A)(4)) as

> Coca leaves and any salt, compound, derivative, or preparation of coca leaves (including cocaine and ecgonine, their salts, isomers, and derivatives, and salts of those isomers and derivatives), and any salt, compound, derivative, or preparation thereof that is chemically equivalent to or identical with any of these substances * * *.

{¶ 45} Cocaine is similarly defined in R.C. 2925.01(X). In both statutes, "cocaine" does not include the entire "mixture" as is the case with marihuana, LSD, and hashish. We must presume that the legislature's failure to include such language in the definition of cocaine was intentional. *See State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9, quoting *Columbus-Suburban Coach Lines v. Public Utilities Comm.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969) ("'[I]t is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.'"). Consequently, we conclude that a defendant may be held liable for cocaine offenses under R.C. 2925.11 for only that portion of the disputed substance that is chemically identified as cocaine.

{¶ 46} Here, the state offered no evidence as to the purity of the cocaine. While there was testimony concerning the weight of exhibit No. 13, the record contains no evidence that would allow a factfinder to determine the weight of actual cocaine contained therein. Nevertheless the state cites several Ohio cases that stand for the

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

proposition that the purity of cocaine is immaterial, and that the entire mixture may be weighed for purposes of the penalty enhancement. *State v. Brown*, 107 Ohio App.3d 194, 668 N.E.2d 514 (3d Dist.1995); *State v. Neal*, 3d Dist. Hancock No. 5-89-6, 1990 WL 88804 (June 29, 1990); *State v. Fuller*, 1st Dist. Hamilton No. C-960753, 1997 WL 598404 (Sept. 26, 1997); *State v. Remy*, 4th Dist. Ross No. 03CA2731, 2004-Ohio-3630; *State v. Chandler*, 157 Ohio App.3d 672, 2004-Ohio-3436, 813 N.E.2d 65 (5th Dist.); *State v. Morris*, 8th Dist. Cuyahoga No. 67401, 1995 WL 571998 (Sept. 28, 1995); *State v. Brooks*, 8th Dist. Cuyahoga No. 50384, 1986 WL 2677 (Feb. 27, 1986). Notably, the above cases rely upon a prior version of R.C. 2925.01 that defined the bulk amount of a controlled substance as "[a]n amount equal to or exceeding ten grams * * * of a compound, mixture, preparation, or substance that is or contains any amount of * * * cocaine." R.C. 2925.01 was subsequently amended in 1995 and the foregoing provision was removed. *See* Am.S.B. No. 2, 1995 Ohio Laws File 50. Consequently, we conclude that the cases cited by the state are inapposite.

{¶ 47} In light of the foregoing, we hold that the state, in prosecuting cocaine offenses under R.C. 2925.11(C)(4)(a) through (f), must prove that the weight of the *actual cocaine* possessed by the defendant met the statutory threshold. *Contra State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568, ¶ 14-15 ("[T]he State was not required to prove that Smith possessed or trafficked pure cocaine equal to or exceeding the statutory amount. Rather, as we have explained, it was enough that the substance * * *, as a whole, satisfied the weight requirement."). Because the state failed to

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

introduce evidence as to the purity or weight of the cocaine in this case, we find that appellant's penalty enhancement under R.C. 2925.11(C)(4)(f) must be reversed and vacated.

{¶ 48} Accordingly, appellant's fourth assignment of error is well-taken.

D. Amendment of Bill of Particulars

{¶ 49} In his fifth and final assignment of error, appellant argues that the trial court erred in allowing the state to amend its bill of particulars without also providing a limiting instruction to the jury on "other bad acts."

{¶ 50} Amendment of the state's bill of particulars is governed by Crim.R. 7 and R.C. 2941.30. Crim.R. 7 states, in relevant part:

> (D) Amendment of indictment, information, or complaint
>
> The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *
>
> (E) Bill of particulars
>
> When the defendant makes a written request within twenty-one days after arraignment but not later than seven days before trial, or upon court order, the prosecuting attorney shall furnish the defendant with a bill of particulars setting up specifically the nature of the offense charge[d] and of

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

the conduct of the defendant alleged to constitute the offense. A bill of particulars may be amended at any time subject to such conditions as justice requires.

{¶ 51} The purpose of a bill of particulars is "to elucidate or particularize the conduct of the accused alleged to constitute the charged offense." *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781 (1985). Additionally, the Supreme Court of Ohio has held that "[t]he purpose of the bill of particulars is to inform an accused of the exact nature of the charges against him so that he can prepare his defense thereto." *State v. Fowler*, 174 Ohio St. 362, 364, 189 N.E.2d 133 (1963).

{¶ 52} Crim.R. 7 vests the trial court with discretion when considering the state's motion to amend its bill of particulars. Thus, we review the trial court's decision for an abuse of discretion. *State v. Brumback*, 109 Ohio App.3d 65, 81, 671 N.E.2d 1064 (9th Dist.1996), citing *State v. Mundy*, 99 Ohio App.3d 275, 313, 650 N.E.2d 502 (2d Dist.1994). "[F]or the amendment to constitute reversible error, the defendant must demonstrate that the amendment hampered [his] defense or otherwise prejudiced [him]." *Id.*; *see also* R.C. 2941.30 (indicating that "no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted").

{¶ 53} In the case sub judice, the trial court granted the state's motion to amend its bill of particulars on the last day of trial, to include appellant's initial meeting with

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

Ramirez at the Meijer parking lot located in Wood County. Under Crim.R. 7, the state was permitted to amend its bill of particulars at any time provided the amendment did not change the name or identity of the crime charged. Appellant argues that the amendment changed the identity of the crime charged by incorporating the Meijer meeting and thereby making it impossible to determine whether the jury convicted him for possession of cocaine as a result of the meeting at Meijer or the meeting at the Super 8 motel later that day. The state, for its part, contends that the amendment did not change the identity of the crime charged because the meeting at Meijer was part of the same course of criminal conduct for which appellant was initially indicted.

{¶ 54} Our examination of the facts in this case reveals that the meeting at Meijer was a necessary predicate to the meeting at Super 8. Relevant to our resolution of this issue, Apple stated the following concerning the purpose of the meeting at Meijer: "We wanted to show [appellant] an actual kilogram of cocaine so he could take a look at it, so [he] could take a look at it, and open it if he wanted to so he would have a good idea of what he was looking at." When asked whether the meeting at Meijer was part of the broader transaction, Apple indicated that it was, noting that the meeting was scheduled so that appellant "could see what the quality of the cocaine was, so he could take his knowledge of what it was to the people that he was introducing or that were bringing the money in, so that he would know the quality of the cocaine." Apple's testimony establishes that the meeting at Meijer was arranged in order to allow appellant to sample the cocaine to determine its purity, arrive at acceptable terms with regard to price and

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

quantity, and establish a place and time to meet to complete the transaction. Following the meeting at Meijer, appellant traveled to Toledo, acquired the cash needed to purchase the cocaine, and proceeded to meet Ramirez at Super 8 where he actually purchased the cocaine and took possession of it.

{¶ 55} In light of the foregoing, we agree with the state that the meeting at Meijer was part of a broader course of criminal conduct that culminated in appellant's purchase of cocaine from Ramirez at the Super 8 motel. As a result, we find that the state's amendment of the bill of particulars to include the meeting at Meijer did not change the identity of the crime charged.

{¶ 56} Having found that the amendment to the state's bill of particulars did not change the identity of the crime with which appellant was charged, we conclude that the trial court did not abuse its discretion in granting the state's motion to amend its bill of particulars. Accordingly, appellant's fifth assignment of error is not well-taken.

III. Conclusion

{¶ 57} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed, in part, and reversed, in part. Appellant's penalty enhancement under R.C. 2925.11(C)(4)(f) is hereby reversed and vacated, and this matter is remanded to the trial court for resentencing consistent with this decision. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JOURNALIZED
COURT OF APPEALS
FEB - 6 2015

{¶ 58} We recognize that our decision in this case is in conflict with the decision of the Second District Court of Appeals in *State v. Smith*, 2d Dist. Greene No. 2010-CA-36, 2011-Ohio-2568. Therefore, pursuant to Ohio Constitution, Article IV, Section 3(B)(4), we sua sponte certify a conflict to the Supreme Court of Ohio for review and final determination of the following question: Must the state, in prosecuting cocaine offenses involving mixed substances under R.C. 2925.11(C)(4)(a) through (f), prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture? The parties are directed to S.Ct.Prac.R. 7.01 and 7.08 for further proceedings.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

Stephen A. Yarbrough, P.J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.

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COURT OF APPEALS
FEB - 6 2015

26.

FILED
WOOD COUNTY CLERK
COMMON PLEAS COURT

2013 NOV 14 P 3:01

CINDY A. HOFNER

IN THE COURT OF COMMON PLEAS OF WOOD COUNTY, OHIO

State of Ohio,
Plaintiff,

Case No. 12 CR 412

v.

JUDGE REEVE KELSEY

Rafael Gonzales,
Defendant.

JUDGMENT ENTRY ON
JURY TRIAL

November 6, 2013

This matter came before the court for a jury trial on November 5 and 6, 2013. Present were Gwen Howe-Gebers, Esq., Assistant Prosecuting Attorney, for the state, and the defendant with his counsel, Andrew Mayle, Esq., and Jeremiah Ray, Esq.

Following voir dire, twelve jurors and one alternate were selected. The jury panel was then given the oath of the court and the state presented its opening statement. Upon the state's conclusion, the defendant presented an opening statement. The state presented its witnesses. State's Exhibits #1through #11, #13, #14, #16, #20, and #21 were offered and admitted. The state then rested. The defendant made a motion for a directed verdict, which was denied. The defendant declined to present any evidence. The state then presented its closing argument. The defendant also presented a closing argument, to which the state offered a rebuttal.

JOURNALIZED
NOV 14 2013

Jury instructions were read to the jury and the alternate juror was selected and disclosed. The alternate was retained pursuant to Crim.R. 24. The jury retired for their deliberations.

The court was then notified that the jury had reached a verdict and the verdict was read in open court. The jury found the defendant guilty of Possession of Cocaine, a violation of R.C. 2925.11(A) & (C)(4), a felony of the first degree.

The court accepted the jury's findings. The jurors, along with the alternate, were dismissed with the thanks of the court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant is found guilty of Possession of Cocaine, a violation of R.C. 2925.11(A) & (C)(4), a felony of the first degree.

The court proceeded to sentencing.

Counsel for the offender spoke to the Court on behalf of his client. The state recommended a prison term. Upon inquiry, the offender declined to make a statement prior to the imposition of sentence.

In determining the sentence, the record, all oral statements, information and testimony presented at trial, the jury's verdict, both for the offense of possession of cocaine and as to the amount of cocaine possessed by the offender, the pertinent financial information that reflects upon the offender's present and future ability to pay any financial sanctions imposed, the purposes and principles of sentencing as well as the seriousness and recidivism factors were carefully reviewed.

The court noted that the overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the

JOURNALIZED

NOV 14 2013

offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. The court further noted that in achieving those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

The court further noted that a sentence must be commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

The Court finds that R.C. 2925.11(C)(4)(f), if the amount of the drug involved equals or exceeds 100 grams of cocaine, possession of cocaine is a felony of the first agree, the offender is a major drug offender and that specification was included in the indictment and the Court shall impose as a mandatory prison term of the maximum prison term prescribed for a felony of the first degree.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that for the offense of Possession of Cocaine, a violation of R.C. 2925.11(A) & (C)(4), a felony of the first degree, with a Major Drug Offender Specification, that the offender is sentenced to a mandatory term of eleven (11) years in the Ohio Department of Rehabilitation and Correction.

IT IS ORDERED that the offender shall pay a mandatory fine of $15,000.00 to the Wood County Clerk of Courts who shall disburse said monies to BCI&I.

JOURNALIZED

NOV 14 2013

IT IS ORDERED that the offender's operator's license is suspended for a period of five (5) years.

IT IS ORDERED that the offender submit to DNA testing pursuant to R.C. 2901.07.

POST RELEASE CONTROL

The offender will be subject to Post Release Control of five (5) years as well as the consequences for violating the conditions of post release control imposed by the Parole Board pursuant to R.C. 2967.28. If the offender violates a post release control sanction, the Adult Parole authority, or the Parole Board may impose a more restrictive sanction, may increase the duration of the post release control or may impose a prison term, which may not exceed nine (9) months. The maximum cumulative prison term imposed for violations during post release control may not exceed one-half of the stated prison term. Further, if the violation of the sanction is a felony, the offender may be prosecuted for the felony and, in addition, the Court may impose a prison term for the violation. The offender is ordered to serve as a part of this sentence any term of post release control imposed by the Parole Board and any prison term for violation of the post release control conditions.

CREDITS AND COSTS

The offender is given credit for jail time served pursuant to R.C. 2967.191. The Court has been informed that the offender has been incarcerated for four hundred

JOURNALIZED

NOV 14 2013

and sixty-eight (468) days in the Wood County Justice Center as of the date of sentencing.

RIGHT TO APPEAL

The court reviewed with the offender his right to appeal a sentence that is contrary to law.

Offender is ordered to pay the costs of this prosecution. Judgment is awarded for costs and execution awarded. The offender is notified that if the offender fails to pay this judgment or fails to make timely payments towards that judgment under a payment schedule approved by the court, the court may order the offender to perform additional community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the offender is in compliance with the approved payment schedule. The offender is also notified that if the court orders the offender to perform the community service, the offender will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount. The specified hourly credit rate per hour will be that minimum wage established as contemplated by R.C. 4111.02 as then in effect.

Bond released.

Offender is remanded to the custody of the Wood County Sheriff to await transportation to the Correction and Reception Center, Orient, Ohio.

The defendant then requested counsel be appointed to pursue an appeal.

JOURNALIZED

NOV 14 2013

IT IS ORDERED that Tim Dugan, Esq., is appointed to represent the defendant for purposes of appeal.

11/14/13
Date

Judge Reeve Kelsey

CERTIFICATE

The undersigned mailed or delivered a copy of this entry to Gwen Howe-Gebers, Esq.; Andrew Mayle, Esq., and Jeremiah Ray, Esq., at 210 S. Front St., Fremont, OH 43420; Tim Dugan, Esq., at 2460 Navarre Ave., Ste. 6, Oregon, Ohio 43616; the defendant c/o WCJC; the Adult Probation Department; and the Wood County Sheriff.

11-14-13

Julie K. Latham

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NOV 14 2013

[Cite as *State v. Smith*, 2011-Ohio-2568.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 2010-CA-36
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-530
v.	:	
	:	(Criminal Appeal from
WILLIAM C. SMITH, II	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 27th day of May, 2011.

. . . . . .

STEPHEN K. HALLER, by STEPHANIE R. HAYDEN, Atty. Reg. #0082881, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385
Attorney for Plaintiff-Appellee

ROBERT ALAN BRENNER, Atty. Reg. #0067714, Robert Alan Brenner, LLC, Post Office Box 341021, Beavercreek, Ohio 45434
Attorney for Defendant-Appellant

. . . . . .

HALL, J.

{¶ 1} William Smith appeals from his conviction and sentence in Greene County Common Pleas Court on several drug-related charges stemming from his sale of cocaine to a confidential informant.

{¶ 2} Smith advances two assignments of error on appeal. First, he challenges the

legal sufficiency of the evidence to support his conviction on one count of cocaine possession, one count of cocaine trafficking, and one count of possessing criminal tools. Second, he claims the verdict forms for two trafficking counts were fatally defective.

{¶ 3} The charges against Smith stemmed from two controlled drug transactions he participated in with a confidential informant identified as Andrea W. The first transaction took place on March 30, 2009. On that occasion, police wired Andrea W. and gave her money to purchase drugs from Smith. She proceeded to purchase what a field test revealed was cocaine. The second transaction took place the following day. Once again, Andrea W. met with police and received money to buy drugs from Smith. She then purchased what a field test revealed was cocaine.

{¶ 4} At trial, forensic chemist Jennifer Watson testified that the substance Smith sold on March 30, 2009, weighed 2.83 grams, and the substance he sold on March 31, 2009, weighed 12.39 grams. Watson tested .01 grams of each substance and determined that each contained cocaine. She did not determine what percentage of each sample was cocaine and what percentage was a filler. In that regard, Watson explained that caffeine, baking soda, certain sugars, corn starch, and even inosotil (a health food supplement) can be mixed with cocaine to "cut" it. Although she determined that each of the substances she tested contained cocaine, she conceded that they could be one percent cocaine and ninety-nine percent filler. At the conclusion of Smith's trial, a jury convicted him on multiple charges. The trial court imposed an aggregate sentence of five years in prison. This appeal followed.

{¶ 5} Smith's first assignment of error challenges the legal sufficiency of the evidence to support his conviction on counts four and six, which charged him with trafficking

and possession. When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "An appellate court's function when 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.

{¶ 6} In support of his insufficiency argument, Smith first challenges his conviction on counts four and six of his indictment. Count four charged him with trafficking in ten to one-hundred grams of cocaine. Count six charged him with possessing five to twenty-five grams of cocaine. Because the penalty for each offense is tied to the amount of cocaine trafficked or possessed, Smith correctly notes that the State was required to prove the amounts charged in the indictment.

{¶ 7} Smith argues that the State failed to prove the amount of "the drug involved" in counts four and six. He notes Watson's testimony that she tested only .01 grams of each substance and her concession that each substance could have been ninety-nine percent filler and one percent cocaine. Smith asserts that the State was required to prove what portion of each substance was a drug and to weigh only that portion of the entire substance. Instead, Watson weighed the entire substance, and the State relied on that weight to prove the amounts

alleged in his indictment. Therefore, he claims the State presented legally insufficient evidence to support his conviction on counts four and six.

{¶ 8} We begin our analysis with a review of the pertinent statutes. Revised Code section 2925.03(A)(1) prohibits the sale or offer to sell a controlled substance. A violation of R.C. 2925.03(A)(1) constitutes "trafficking in cocaine" if "the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine." R.C. 2925.03(C)(4). Trafficking in cocaine is a third-degree felony if "the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine."

{¶ 9} Similarly, R.C. 2925.11(A) prohibits obtaining, possessing, or using a controlled substance. A violation of R.C. 2925.11(A) constitutes "possession of cocaine" if "the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine." R.C. 2925.11(C)(4). Possession of cocaine is a fourth-degree felony if "the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine." R.C. 2925.11(C)(4)(b).

{¶ 10} Under the foregoing provisions, the State could convict Smith by proving that "the drug involved in the violation [was] * * * a compound, mixture, preparation, or substance containing cocaine" and that "the amount of the drug involved" equaled or exceeded the statutory threshold. At trial, Watson testified that the drug involved in Smith's case was an "off-white chunky substance" containing cocaine. She also testified that the weight of the drug involved (the off-white chunky substance) exceeded the statutory threshold for the indicted charges. (Transcript, Vol. 1 at 158-159).

{¶ 11} On appeal, Smith insists that "the drug involved" did not include parts of the

substance other than actual cocaine. In support, he notes that under R.C. Chapter 2925, the definition of "drug" includes "[a]ny article, other than food, intended to affect the structure or any function of the body of humans or animals." R.C. 2925.01(C); R.C. 4729.01(E)(3). Because some of the things commonly mixed with cocaine may be considered "food items" (i.e., caffeine, baking soda, sugar, corn starch, and inosotil), 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."

{¶ 12} Upon review, we find Smith's argument to be unpersuasive. "The drug involved" in the present case was an off-white chunky substance containing cocaine. See R.C. 2925.03(C)(4). This substance is not something typically used for food or drink. Therefore, it does not qualify as food. Case law does not support Smith's claim that the State was required to segregate the cocaine from the other ingredients in the substance. See, e.g., *State v. Moore*, Montgomery App. No. 21863, 2007-Ohio-2961, ¶8 (concluding that "[t]he jury also was not required to disregard the weight of moisture in the crack cocaine when determining its weight"); *State v. Bailey*, Montgomery App. No. 21123, 2005-Ohio-6669, ¶8 (rejecting an argument "that the filler should not be included in determining the weight of the controlled substance"); *State v. Combs* (Sept. 10, 1991), Montgomery App. No. 11949 (reasoning "that any amount of cocaine is sufficient to subject a defendant to criminal liability under R.C. 2925.03(A)(6) when found in a compound, mixture, preparation or substance that satisfies the required statutory weight or dosage"); *State v. Fuller*, (Sept. 26, 1997), Hamilton App. No. C-960753 ("The quantity of the entire mixture, rather than the quantity of pure cocaine within

the mixture, is used to determine bulk amount. * * * The fact that the analyst did not do a qualitative analysis to determine the purity of the cocaine was irrelevant to her testimony concerning the weight of the substance and whether cocaine was mixed in the substance.").

{¶ 13} Smith next takes issue with the verdict forms for counts four and six. Both forms included a finding by the jury that "the cocaine" at issue was equal to or exceeded the statutory amount. Because Watson determined only the weight of the off-white chunky substance as a whole, and not the weight of the actual cocaine within the substance, Smith claims the evidence is insufficient to support the jury's verdicts.

{¶ 14} Once again, we are unpersuaded. The State was required to prove that "the drug involved" was "a compound, mixture, preparation, or substance containing cocaine" and that "the amount of the drug involved" equaled or exceeded the statutory threshold. Notwithstanding the language of the verdict forms, the State was not required to prove that

{¶ 15} Smith possessed or trafficked pure cocaine equal to or exceeding the statutory amount. Rather, as we have explained, it was enough that the substance Watson tested, as a whole, satisfied the weight requirement. Thus, insofar as Smith has couched his argument as one involving the sufficiency of the evidence, we conclude that the State presented legally sufficient evidence to support his conviction on counts four and six.

{¶ 16} Smith's real argument, however, appears to be that the verdict forms for counts four and six were flawed because they indicated that he possessed and sold a certain quantity of "cocaine" rather than a "substance containing cocaine." We reject this argument for at least three reasons. First, although the latter characterization is more precise, Smith did not object to the wording of the verdict forms prior to the jury's verdict. Second, the crimes of

"possession of cocaine" and "trafficking in cocaine" are committed when an offender possesses or sells a substance containing cocaine. See R.C. 2925.11(C)(4); R.C. 2925.03(C)(4). Under the statutory scheme, then, possessing or selling "cocaine" is the same as possessing or selling a substance containing cocaine. There is no meaningful difference between the two. Third, the disputed wording only could have prejudiced the State. As explained above, the State was required to prove that Smith had possessed and sold a substance of a certain weight that contained some cocaine. The wording may have appeared to require more by referring to "cocaine" rather than "a substance containing cocaine." The trial court recognized this fact in its ruling on a post-verdict Crim.R. 29(C) motion for judgment of acquittal. In overruling the motion, the trial court reasoned:

{¶ 17} "* * * [T]he Court recognizes that the definition of bulk refers to various amounts, including in this particular case, an amount of substance that would be in excess of 10 grams, less than 100 grams, but the statute indicates which contains any amount of cocaine [sic].

{¶ 18} "So, in other words, there is only a requirement that the State establish beyond a reasonable doubt that the amount of substance involved in the alleged transaction contains some amount of cocaine. It does not require the State to prove the total amount of cocaine. That is, in the Court's opinion, the law, and based upon that, the Court will find that the State is not required to prove more than what they did in this particular case.

{¶ 19} "Counsel has pointed out the fact that the Jury could have been instructed that they only had to find any amount [of cocaine in the substance]; however, the Court will find that that could only prejudice the State, not the Defendant. The Jury made a finding that there

was an amount consistent with the law in this particular case and they could have made the argument that the State did not show that there was at least 10 grams of cocaine. So I don't find that any other determination would have been prejudicial to the Defendant." (Transcript, Vol. 2 at 250).

{¶ 20} Upon review, we agree with the trial court and determine that the wording of the verdict forms for counts four and six was not error.

{¶ 21} Smith next challenges the legal sufficiency of the evidence to support his conviction on count five, which charged him with possession of criminal tools. This count, which involved the second drug transaction between Smith and Andrea W., alleged that he had used a plastic bag to transfer the cocaine. Although Smith concedes the record contains evidence that he transferred cocaine "in a baggie" during the first transaction on March 30, 2009, he claims the State presented no evidence that he used a plastic bag during the second transaction the following day.

{¶ 22} Upon review, we find Smith's argument to be without merit. In *State v. Moulder*, Greene App. No. 08-CA-108, 2009-Ohio-5871, ¶8, this court recognized that a plastic baggie used to hold cocaine is a criminal tool. Moreover, Andrea W. testified at trial and identified State's exhibit 12 as being "the coke" she bought on March 31, 2009. The record reflects that exhibit 12 is a plastic bag containing white powder. Prior to trial, the plastic bag containing the white powder had been stored in a yellow evidence envelope. (Transcript, Vol. 1 at 118). In addition, detective Richard Miller testified and identified State's exhibit 12 as being a picture of a bag of cocaine that police removed from Andrea W. after she met with Smith on March 31, 2009. (Id. at 76-77, 82). Based on the foregoing testimony, the

jury reasonably could have inferred that cocaine was in a plastic bag when she purchased it from Smith. As a result, the record contains legally sufficient evidence to support his conviction on count five. The first assignment of error is overruled.

{¶ 23} In his second assignment of error, Smith challenges the adequacy of the verdict forms for counts one and four. The forms both state that he was found guilty of "trafficking in drugs." Smith notes, however, that his indictment charged him with "trafficking in cocaine." Based on this discrepancy, he argues that the verdict forms for counts one and four do not support his convictions. We disagree.

{¶ 24} Count one of the indictment charged Smith with selling or offering to sell a controlled substance in violation of R.C. 2925.03(A)(1). Count one identified the substance as cocaine and charged the offense as a fifth-degree felony. Count one also characterized the crime as "[t]rafficking in [c]ocaine." The verdict form for count one referred to R.C. 2925.03(A)(1) and asked jurors to decide whether Smith was guilty of "[t]rafficking in [d]rugs." In this regard, the verdict form could have been more specific. When the "drug" at issue contains cocaine, a schedule II drug, technically the offender is guilty of "trafficking in cocaine." R.C. 2925.03(C)(4). On the other hand, "[i]f the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V," the offender is guilty of "trafficking in drugs." R.C. 2925.03(C)(2). We do not find the wording of the verdict form to be error.

{¶ 25} Moreover, even if we were to construe the wording of the verdict form for count one to be error, Smith did not object to its wording and, therefore, waived all but plain error. *State v. Williams* (1996), 74 Ohio St.3d 569, 573. "A silent defendant has the burden to

satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *State v. Davis,* Highland App. No. 06CA21, 2007-Ohio-3944, ¶22, citing *United States v. Vonn* (2002), 535 U.S. 55, 59, 1225 S.Ct. 1043, 152 L.Ed. 2d 90. Plain error does not exist unless, but for the error, the outcome of the proceeding clearly would have been different. *State v. Harris*, Montgomery App. No. 20841, 2005-Ohio-6835, ¶7.

{¶ 26} We find no plain error here for at least three reasons. First, the evidence at trial made clear, beyond any doubt, that the drug involved in count one was cocaine. Second, the trial court explicitly instructed the jury that count one accused Smith of "trafficking in cocaine." Third, Smith was charged with selling or offering to sell a controlled substance in violation of R.C. 2925.03(A)(1), a fact the verdict form made clear. As the State correctly points out, the charge was a fifth-degree felony, the lowest-level violation possible under R.C. 2925.03(A)(1), for either "trafficking in drugs" or "trafficking in cocaine." Therefore, we could not say the outcome would have been different if the verdict form had used the word "cocaine" rather than "drugs."

{¶ 27} We reach the same conclusion with regard to the verdict form for count four. In the indictment, count four charged Smith with selling or offering to sell a controlled substance. Count four identified the substance as cocaine and charged the offense as a third-degree felony based on the amount being between ten and one-hundred grams. Count four of the indictment also characterized the crime as "[t]rafficking in [c]ocaine." As with count one, the verdict form for count four referred to R.C. 2925.03(A)(1) and asked jurors to decide whether Smith was guilty of "[t]rafficking in [d]rugs." Notably, however, the verdict

form for count four specifically asked jurors to decide whether the weight of "the cocaine" involved was between ten and one-hundred grams. In addition, the trial court instructed jurors that count four charged Smith with "trafficking in cocaine." Therefore, they plainly knew that count four involved trafficking in cocaine. We note too that the reference to cocaine and the quantity of the drug in the verdict form properly made count four a third-degree felony. Once again, Smith did not object and we find no plain error.

{¶ 28} In opposition to the foregoing conclusion, Smith relies solely on *State v. Reed* (1985), 23 Ohio App.3d 119. In that case, the First District Court of Appeals declared a verdict form ineffective and void where it found the defendant guilty of "TRAFFICKING OFFENSE (SALE) 2925.03(A)(1)." The First District noted that there was no such crime as "trafficking offense." The *Reed* court further found it impossible to determine from the verdict the name or degree of the offense (which established the penalty) or the name or classification of the drug (from which the name and degree of the offense could have been established).

{¶ 29} We find *Reed* to be distinguishable. As set forth above, the evidence against Smith established that the drug involved in counts one and four was cocaine. The verdict forms for counts one and four also charged Smith with violating R.C. 2925.03(A)(1), which prohibits the sale or offer to sell a controlled substance. Moreover, although the verdict form for count one did not state the degree of Smith's offense, he was convicted of a fifth-degree felony, which is the lowest-level offense that exists under R.C. 2925.03(A)(1). Therefore, unlike *Reed*, the failure of the verdict form for count one to identify the name or classification of the drug, or the degree of the offense, was not prejudicial. With regard to count four, the verdict form *did* identify the name of the drug and the proven weight. Thus, unlike *Reed*, the

verdict form supported Smith's conviction for a third-degree felony on count four. The second assignment of error is overruled.

{¶ 30} Based on the reasoning set forth above, we affirm the judgment of the Greene County Common Pleas Court.

. . . . . .

FAIN and FROELICH, JJ., concur.

Copies mailed to:

Stephen K. Haller
Stephanie R. Hayden
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Hon. Stephen Wolaver

ORC Ann. 2925.11

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238), with gaps including files 11 (HB 64), 22 (HB 70), and 23 (HB 155).

Page's Ohio Revised Code Annotated > *Title 29: Crimes — Procedure* > *Chapter 2925: Drug Offenses* > *Drug Abuse*

§ 2925.11 Possession of drugs.

(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," *52 Stat. 1040* (1938), *21 U.S.C.A. 301*, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, hashish, and controlled substance analogs, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs 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.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the first degree or, if the offender previously has been convicted of a drug abuse offense, a felony of the fifth degree.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams but is less than forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds forty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, possession of cocaine is a felony of the fourth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams of cocaine, possession of cocaine is a felony of the third degree, and, except as otherwise provided in this division, there is a presumption for a prison term for the offense. If possession of cocaine is a felony of the third degree under this division and if the offender two or more times previously has been convicted of or pleaded guilty to a felony drug abuse offense, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds twenty grams but is less than twenty-seven grams of cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) 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.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. 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.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin 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.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), (f), or (g) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams but is less than two thousand grams of hashish in a solid form or equals or exceeds two hundred grams but is less than four hundred

grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose a mandatory prison term of five, six, seven, or eight years.

(g) If the amount of the drug involved equals or exceeds two thousand grams of hashish in a solid form or equals or exceeds four hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(8) If the drug involved is a controlled substance analog or compound, mixture, preparation, or substance that contains a controlled substance analog, whoever violates division (A) of this section is guilty of possession of a controlled substance analog. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(8)(b), (c), (d), (e), or (f) of this section, possession of a controlled substance analog is a felony of the fifth degree, and division (B) of *section 2929.13 of the Revised Code* applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten grams but is less than twenty grams, possession of a controlled substance analog is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty grams but is less than thirty grams, possession of a controlled substance analog is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds thirty grams but is less than forty grams, possession of a controlled substance analog is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds forty grams but is less than fifty grams, possession of a controlled substance analog is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds fifty grams, possession of a controlled substance analog 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.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and *sections 2929.13*, *2929.14*, *2929.22*, *2929.24*, and *2929.25 of the Revised Code* and in addition to any other sanction that is imposed for the offense under this section, *sections 2929.11* to *2929.18*, or *sections 2929.21* to *2929.28 of the Revised Code*, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1)

(a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of *section 2929.18 of the Revised Code* unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of *section 3719.21 of the Revised Code*, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of *section 2929.18 of the Revised Code* in accordance with and subject to the requirements of division (F) of *section 2925.03 of the Revised Code*. The agency that receives the fine shall use the fine as specified in division (F) of *section 2925.03 of the Revised Code*.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with *section 2925.38 of the Revised Code*.

(F) It is an affirmative defense, as provided in *section 2901.05 of the Revised Code*, to a charge of a fourth degree felony violation under this section that the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use. Notwithstanding any contrary provision of this section, if, in accordance with *section 2901.05 of the Revised Code*, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of *section 2925.03 of the Revised Code* applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

(H) It is an affirmative defense to a charge of possession of a controlled substance analog under division (C)(8) of this section that the person charged with violating that offense obtained, possessed, or used an item described in division (HH)(2)(a), (b), or (c) of *section 3719.01 of the Revised Code*.

History

138 v S 184, § 5 (Eff 6-20-84); 143 v S 258 (Eff 11-20-90); *144 v H 62* (Eff 5-21-91); *144 v H 298* (Eff 7-26-91); *145 v H 377* (Eff 9-30-93); *145 v H 391* (Eff 7-21-94); *146 v H 249* (Eff 7-17-95); *146 v S 2* (Eff 7-1-96); *146 v S 269* (Eff 7-1-96); *147 v S 2* (Eff 6-20-97); *147 v S 66* (Eff 7-22-98); *148 v S 107* (Eff 3-23-2000); *148 v H 241*. Eff 5-17-2000; *149 v H 490*, § 1, eff. 1-1-04; *149 v S 123*, § 1, eff. 1-1-04; *151 v S 154*, § 1, eff. 5-17-06; *152 v H 195*, § 1, eff. 9-30-08; 2011 HB 86, § 1, eff. Sept. 30, 2011; 2011 HB 64, § 1, eff. Oct. 17, 2011; 2012 HB 334, § 1, eff. Dec. 20, 2012.

Annotations

Notes

Editor's Notes

Acts 2011, HB 86, § 3 provides: "The amendments to *sections 2925.01*, *2925.03*, *2925.05*, and *2925.11 of the Revised Code*, and to division (W) of *section 2929.01 of the Revised Code*, that are made in this act apply to a person who commits an offense involving marihuana, cocaine, or hashish on or after the effective date of this act and to a person to whom division (B) of *section 1.58 of the Revised Code* makes the amendments applicable.

"The provisions of *sections 2925.01*, *2925.03*, *2925.05*, and *2925.11 of the Revised Code*, and of division (W) of *section 2929.01 of the Revised Code*, in existence prior to the effective date of this act shall apply to a person upon whom a court imposed sentence prior to the effective date of this act for an offense involving marihuana, cocaine, or hashish. The amendments to *sections 2925.01*, *2925.03*, *2925.05*, and *2925.11 of the Revised Code*, and to division (W) of *section 2929.01 of the Revised Code*, that are made in this act do not apply to a person upon whom a court imposed sentence prior to the effective date of this act for an offense involving marihuana, cocaine, or hashish.'

Acts 2012, HB 334, § 4 provides: "*Section 2925.11 of the Revised Code* is presented in this act as a composite of the section as amended by both Sub. H.B. 64 and Am. Sub. H.B. 86 of the 129th General Assembly. The General Assembly, applying the principle stated in division (B) of *section 1.52 of the Revised Code* that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act."

Effect of amendments

The 2012 amendment added "or a controlled substance analog" at the end of (A); in (C)(1), deleted "1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol" following "marihuana" and added "and controlled substance analogs"; rewrote (C)(8) which used to read "(8) If the drug involved is 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol or a compound, mixture, preparation, or substance containing 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, whoever violates division (A) of this section is guilty of possession of spice, a minor misdemeanor"; and added (C)(8)(a) through (f) and (H).

The 2011 amendment by HB 64 inserted "1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol" in the first sentence of the introductory language of (C)(1); and added (C)(8).

The 2011 amendment by HB 86 deleted "and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*" from the end of (C)(1)(e); redesignated former (C)(3)(f) as present (C)(3)(f) and (g) and rewrote them; rewrote (C)(4)(b) through (f); deleted "and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of *section 2929.14 of the Revised Code*" from the end of (C)(5)(f) and (C)(6)(f); rewrote (C)(7)(f) and (g); and made related internal reference changes.

152 v H 195, effective September 30, 2008, in (B)(4), inserted "lawful"; and rewrote (C)(2)(a).

151 v S 154, effective May 17, 2006, inserted "4730" in (B)(1).

Case Notes

Constitutionality

Due process

—Generally

—Classification of offense

—Due process

—Free exercise clause

—Overbreadth

—Proper legislative goals