

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 : Case No. 2016-0428
Plaintiff-Appellant, :
 : On Appeal from the Sandusky County
vs. : Court of Appeals, Sixth Appellate
 : District Case No. S-14-030
Roberto Sanchez, :
 :
Defendant-Appellee. :

**Memorandum in Opposition to Jurisdiction
of Appellee Roberto Sanchez**

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Why This Court Should Decline Jurisdiction

The State offers no substantial constitutional question for this Court to answer. Instead, the State argues that this case involves a matter of public and great general interest because “the Sixth District Court of Appeals changed the standard employed under R.C. 2925.14(C) from a total-weight standard to a purity weight standard.” Yet this case involves a different statute entirely, R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f), and the court of appeals used the standard appropriate upon a plain reading of the statute after H.B. 86 was enacted.

The Sixth District found that Mr. Sanchez should have been, but was not, tried and sentenced under the post-H.B. 86 version of the R.C. 2925.03. *State v. Limoli*, 140 Ohio State.3d 188, 2014-Ohio-3072, 16 N.E.2d 641, syllabus.

The State asks this Court to accept this appeal because the final determination in *State v. Gonzales*, Case Nos. 2015-0384 and 2015-0385, “would resolve the issue in this case as to which standard of weight would be required in cocaine related cases.” This is inaccurate.

The certified conflict question in *Gonzales*, pending this Court’s decision, is:

“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?”

In *Gonzales*, the Sixth District focused on the language of R.C. 2925.11(C)(4) to conclude that the State had to present evidence of the actual weight of cocaine. The State presented no evidence of the actual weight of cocaine in the mixture.

Here, Mr. Sanchez was convicted at trial of three offenses in violation of R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f), not R.C. 2925.11(C)(4)(a) through (f). The Sixth District determined that Mr. Sanchez was improperly convicted for two separate counts of trafficking in cocaine for one single transaction involving cocaine, and the felony levels of his

convictions were based on the wrong weights of cocaine presented at trial, and the corresponding penalties were no longer supported by post-H.B. 86 law.

Here, the State presented the weights of actual cocaine at trial and the Sixth District determined that those weights should be the basis for Mr. Sanchez's felony convictions. The Sixth District was correct in its analysis of current R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f) and properly ordered that Mr. Sanchez be convicted and sentenced for one third-degree felony and one fifth-degree felony.

This Court should decline jurisdiction.

Statement of the Case and Facts

The relevant facts and procedural history were summarized in the Fourth District's opinion below:

The Drug Enforcement Agency ("DEA") arranged for a confidential informant ("CI") to purchase drugs from Roberto Sanchez. Two transactions are at issue in this case. The first occurred on July 1, 2008. At that time, the CI purchased both crack and powder cocaine from Sanchez. The second occurred on August 14, 2008. The CI purchased only crack cocaine that time.

The evidence obtained against Sanchez was part of a larger investigation, so authorities delayed filing charges. Sanchez was indicted on July 18, 2012. In Count 2 of the indictment he was charged with trafficking in crack cocaine in an amount exceeding 25 grams but less than 100 grams, a violation of R.C. 2925.03(A)(1)(C)(4)(f); in Count 3 he was charged with trafficking in cocaine in an amount exceeding five grams but less than 10 grams, that is not crack cocaine, a violation of R.C. 2925.03(A)(1)(C)(4)(c); and in Count 4, he was charged with trafficking in crack cocaine in an amount exceeding five grams but less than 10 grams, a violation of R.C. 2925.03(A)(1)(C)(4)(d). The state did not pursue Count 1 of the indictment.

The case was tried to a jury beginning February 4, 2014, and lasted for three days. Sanchez was convicted of all counts. On March 31, 2014, the trial court sentenced Sanchez to eight years in prison on Count 2, 12 months on Count 3, and 36 months on Count 4, to be served concurrently.

Sanchez appealed from the court's March 31, 2014 judgment..

State v. Sanchez, 6th Dist. Sandusky No. S-14-030, 2016-Ohio-542.

Mr. Sanchez should have been convicted and sentenced for one third-degree felony in connection with the July 1, 2008 transaction, and one fifth-degree felony in connection with the August 14, 2009 transaction. *Sanchez* at ¶ 27. The court of appeals found that the trial court plainly erred when it: (1) convicted and sentenced Mr. Sanchez for two counts of trafficking in cocaine that occurred on the same day as part of the same transaction on July 1, 2008; (2) convicted and sentenced Mr. Sanchez to enhanced levels of trafficking in cocaine based on gross weight that included other material instead of the weight of actual cocaine; and (3) convicted and sentenced based on pre-H.B. 86 law that penalized crack and powder cocaine differently. The Sixth District reversed and remanded the case to trial court of resentencing.

The State appealed to this Court.

Response to State’s Proposition of Law

State’s Proposition of Law

In a prosecution under R.C. 2925.03(A) and (C) the level of the offense is determined by the total weight of the cocaine or a compound, mixture, preparation, or substance containing cocaine and not the weight of the pure cocaine.

The State argues that the “spirit or intention a law must prevail over the letter.” Mr. Sanchez agrees. The spirit and intention of R.C. 2925.03(A) and (C) is to penalize trafficking in actual cocaine.

As a preliminary matter, Mr. Sanchez notes that the State cites R.C. 2925.11(C)(4) in its argument. Mr. Sanchez was convicted at trial of three counts in violation of R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f), not R.C. 2925.11(C)(4). Presumably, the State’s statutory interpretation argument is meant to be directed at R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f). Both statutes involve cocaine, and the State argues that the Sixth District “interpreted 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.’” The State appeals from the Sixth District’s opinion that Mr. Sanchez’s felony-level convictions should be based on the weight of actual cocaine involved in the two drug transactions.

The definition of cocaine in the Ohio Revised Code differs from that of many other drugs. A plain reading of the trafficking statute reveals this distinction.

R.C. 2925.03(A)(1) defines the umbrella offense: No person shall knowingly “sell or offer to sell a controlled substance or controlled substance analog.” R.C. 2925.03(C)(1) lists cocaine as an exception to the general penalty provisions for schedule I and schedule II substances. R.C. 2925.03(C)(4) provides: “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 trafficking in cocaine.” Subsections (c) through (f) describe the penalty enhancement based upon the amount of cocaine involved in the violation of R.C. 2925.03(A)(1). For example, R.C. 2925.03(C)(4)(c) describes the penalty “if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine, trafficking in cocaine is a felony of the fourth degree.” The inclusion of the words “of cocaine” means cocaine itself, and not a “compound, mixture, preparation or substance containing cocaine.” It is illogical to read the statute to penalize based on the amount “of cocaine” yet “cocaine” means something containing itself.

This becomes even more clear upon reading the statutory definition of cocaine in R.C. 2925.01(X). Cocaine means any of the following:

- (1) A cocaine salt, isomer, or derivative, a salt of a cocaine isomer or derivative, or the base form of cocaine;

(2) Coca leaves or a salt, compound, derivative, or preparation of coca leaves, including ecgonine, a salt, isomer, or derivative of ecgonine, or a salt of an isomer or derivative of ecgonine;

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

Cocaine is not a “compound, mixture, preparation or substance containing cocaine.” It follows logically that the State must present evidence of the actual amount of cocaine involved in each transaction to determine how Mr. Sanchez can be properly convicted and sentenced under R.C. 2925.03(C)(4) enhancements. It is not an absurd result that Mr. Sanchez be convicted based on the actual amount of cocaine he sold.

When the legislature passed H.B. 86, one of its stated purposes was to “eliminate the difference in criminal penalties for crack cocaine and powder cocaine.” Elimination of the difference in penalties comes only when felony-enhancement is based on the weight of actual cocaine because crack and powder are different compounds of the same drug, cocaine, with different weights based on their composition. The spirit and intention of the law created and amended by General Assembly is maintained when a felony-level conviction under R.C. 2925.03(A)(1) and (C)(4) is based on the weight of actual cocaine involved.

Conclusion

The Sixth District was correct in its analysis of current R.C. 2925.03(A)(1) and (C)(4)(c), (d), and (f) and properly ordered that Mr. Sanchez be convicted and sentenced for only one third-degree felony and one fifth-degree felony. This case presents no constitutional question, and the Sixth District was correct. This Court should decline jurisdiction.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this document has been sent to Norman Solze, Assistant Sandusky County Prosecutor, 100 North Park Avenue, Suite 319, Fremont, Ohio 43420 on this 11th day of April, 2016.

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