[Cite as *State v. Johnson*, 2010-Ohio-1970.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0042**
- vs -	:	
CARL E. JOHNSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 004.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Carl E. Johnson, appeals the judgment of the Trumbull County Court of Common Pleas affirming the verdict rendered by the jury. Johnson was found guilty of possession of marijuana with cash forfeiture, in violation of R.C. 2925.11(A) and former 2925.42(A)(1)(b). At issue is whether the verdict rendered by the jury is against the manifest weight of the evidence and whether the trial court erred in ordering forfeiture of $5,746 recovered from Johnson's person.

{¶2} The instant case emanates from a traffic stop conducted by Ohio State Highway Patrol Trooper Jeremy Nellist on Interstate 80 in Trumbull County, Ohio. A jury trial was held wherein the jury heard the following testimony.

{¶3} While parked in the crossover between the eastbound and westbound lanes, Trooper Nellist clocked a vehicle traveling 72 m.p.h. in a 65 m.p.h. speed zone. He further testified that the driver of the vehicle, Johnson, stared straight ahead to avoid eye contact, gripped the steering wheel at the "10 and 2 o'clock position," and drove a rental car—all of which are "clues" indicative of criminal activity.

{¶4} Trooper Nellist effectuated a traffic stop. During the traffic stop, Trooper Nellist learned that Johnson was not the lessee of record with the rental car company. Trooper Nellist requested Johnson to exit the vehicle, and due to safety concerns, Johnson was asked to sit in the police cruiser. Before entering the police cruiser, Johnson consented to a pat-down search. During the search, Trooper Nellist testified that he felt a "very large bulge, a hard bulge" in Johnson's pocket. Trooper Nellist asked Johnson if he could retrieve the "bulge," and Johnson consented. The pocket contained "a large bundle of money." Trooper Nellist continued his pat-down search of Johnson and again came upon a "similar large, hard bulge" in Johnson's right-side pocket. Again, Trooper Nellist inquired if he could retrieve the "bulge," and Johnson consented. Similarly, Trooper Nellist retrieved a large stack of loose cash.

{¶5} Upon being questioned by Trooper Nellist, Johnson stated that the passengers in his vehicle were his friend and cousin. Johnson stated that he was traveling to Mansfield from Pennsylvania, where they had been shopping. When asked about the $5,746 dollars on his person, Johnson stated that his mother had given him

$3,000 to go shopping, that he worked construction jobs, and that he had just sold a car. Trooper Nellist testified that due to the totality of the circumstances, he called for a K-9 officer.

{¶6} While waiting for the K-9 officer to arrive at the scene, Trooper Nellist requested identification from the two passengers in the vehicle. Trooper Nellist testified that the two occupants gave different versions of the story, which is usually "indicative of criminal activity."

{¶7} Trooper Mike Landers arrived at the scene with his drug dog, Darko. Trooper Landers testified that Darko was trained to detect marijuana, heroin, methamphetamine, and cocaine. As Darko walked around the vehicle, he alerted to its trunk. Trooper Landers, along with Trooper Daniel Keller, searched the vehicle, which contained numerous shopping bags. Inside a shoe box located in one of the shopping bags, Trooper Keller recovered 202 grams of marijuana. After recovering the marijuana, the money retrieved from Johnson's person was transported to a nearby scale house. Darko alerted to the odor of an illegal substance on the money.

{¶8} A jury trial was held, and Johnson was convicted of possession of marijuana with cash forfeiture, in violation of R.C. 2925.11(A) and former 2925.42(A)(1)(b). Johnson filed a timely notice of appeal and, as his first assignment of error, asserts:

{¶9} "The appellant's conviction for possession of marijuana is against the manifest weight of the evidence."

{¶10} In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶11} "'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶12} Johnson argues that he was not aware of the marijuana in the vehicle and the officers did not take appropriate measures to ascertain who owned the 202 grams of marijuana recovered from inside the shoe box. For example, Johnson asserts that the officers failed to check the bags and box that contained the marijuana for fingerprints and DNA, failed to collect DNA from any of the suspects, and failed to inspect the "other contents of the bag(s) in which the box was found [to determine] which of the three suspects it belonged."

{¶13} Johnson also challenges the connection between the money found on his person and the marijuana found in the vehicle. Johnson argues that while Darko did detect an odor of an illegal narcotic on the cash found in his pocket, the officers should have sent the money for testing to determine which narcotic was present on the money.

{¶14} The evidence and testimony presented at trial indicated that Darko was trained to detect marijuana, heroin, methamphetamine, and cocaine. Trooper Landers testified that while Darko would respond in the same manner to all four of the illegal narcotics, he did alert to the presence of an illegal narcotic on the money found in Johnson's pockets. Moreover, the jury heard testimony that Johnson was the driver of

the rental car, 202 grams of marijuana were found in the vehicle, and a large amount of money was found on Johnson's person.

{¶15} In *State v. Humphrey*, 11th Dist. No. 2008-T-0046, 2009-Ohio-1484, at ¶42-48, this court held that the appellant's convictions were not against the manifest weight of the evidence when the state failed to conduct a DNA analysis on a gun and a one-gallon plastic bag containing marijuana found in a vehicle in which the appellant was sitting. Similar to the instant case, this court noted that the appellant in *Humphrey* "presented no evidence or testimony to the contrary." Id. at ¶46.

{¶16} The jury also heard evidence from Trooper Nellist that Johnson's behavior was indicative of criminal activity. Johnson avoided eye contact with the trooper, he gripped the steering wheel at the "10 and 2 o'clock position," and he drove a rental car. Trooper Nellist also testified that, when questioned, Johnson and the other occupants of the vehicle provided inconsistent stories as to their intended destination.

{¶17} We further recognize that the weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses' credibility, the jury, as the trier-of-fact, had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, the jury was "clearly in a much better position to evaluate the credibility of witnesses than [this] court." Id.

{¶18} The jury, after having the opportunity to listen to the witnesses and judge their credibility, was free to believe that Johnson possessed the marijuana found in the vehicle and that the money found on his person was subject to forfeiture. We defer to

the judgment of the jury and find that their verdict did not create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Johnson's first assignment of error is without merit.

{¶19} As his second assignment of error, Johnson alleges:

{¶20} "The trial court erred by ordering the forfeiture of $[5,746] found on appellant's person."

{¶21} On appeal, Johnson maintains that the state did not present evidence that he "had been involved in the purchase or sale of any drugs," and therefore, it could not prove the money found on his person was the "proceeds of or used to facilitate a drug transaction."

{¶22} The jury found Johnson guilty of possession of marijuana, with a cash forfeiture in violation of former R.C. 2925.42(A)(1)(b). While former R.C. 2925.42 was applicable at the time of Johnson's arrest on June 18, 2007, R.C. 2925.42 was amended July 1, 2007. See Am.Sub.H.B. No. 241 (2005). R.C. 2981.01 through 2981.14 now govern the law of forfeiture. Section 4 of Am.Sub.H.B. No. 241 specifically provides:

{¶23} "Sections 1, 2, and 3 of this act shall take effect on July 1, 2007. If a criminal or civil forfeiture action relating to misconduct under Title XXIX of the Revised Code was or is commenced before July 1, 2007, and is still pending on that date, the court in which the case is pending shall, to the extent practical, apply the provisions of Chapter 2981 of the Revised Code in the case."

{¶24} As the trial court aptly noted during a discussion regarding the applicable forfeiture statute:

{¶25} "[T]he retro-activity regarding the statute as it currently stands deals *** in terms of the way you proceed on pending forfeitures, which this is a pending forfeiture, and the pending forfeiture under the new statute is to have the jury make a determination by a preponderance of the evidence. Whether the $5,746.00 in U.S. currency was intended to be used in any manner to commit or to facilitate the commission of the possession of marijuana charge which would make it subject to forfeiture."

{¶26} R.C. 2981.04 governs criminal forfeiture proceedings and states, in pertinent part:

{¶27} "(B) If a person pleads guilty to or is convicted of an offense *** and the complaint, indictment, or information charging the offense or act contains a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the person's property shall be forfeited. If the state or political subdivision proves by a preponderance of the evidence that the property is in whole or part subject to forfeiture under section 2981.02 of the Revised Code, after a proportionality review under section 2981.09 of the Revised Code when relevant, the trier of fact shall return a verdict of forfeiture that specifically describes the extent of the property subject to forfeiture. ***."

{¶28} When reviewing a judgment based on a preponderance of the evidence, we will not reverse the judgment if there is "some competent, credible evidence going to all the essential elements of the case." *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280.

{¶29} R.C. Chapter 2981 also outlines the procedural rights and obligations of third parties claiming ownership of the property subject to forfeiture, as well as the procedural rights and obligations of those seeking forfeiture of such property to the state. R.C. 2981.03, 2981.04, 2981.05, 2981.06 and 2981.08.

{¶30} In its brief, the state maintains that the issue of forfeiture is not ripe for review, as the trial court held in abeyance the issue of forfeiture "because a third party has laid claim to the cash found on Appellant's person." During trial, Johnson attempted to demonstrate the money at issue belonged to a third party. At the scene of the incident, Johnson told the officer that his mother, Diana Johnson, had given him $3,000 to go shopping. Further, Johnson's attorney noted that Ms. Johnson had a claim to the money and provided the court with her address. The state indicated that it "will give her notice prior to any disbursement of those funds."

{¶31} Based upon the evidence, the trial court stated the following at the sentencing hearing:

{¶32} "There is the forfeiting of $5,746.00. That forfeit will be held in abeyance at least pending any civil hearing to determine whether or not that anybody else has an interest in the money, so that part we will hold in abeyance."

{¶33} The trial court memorialized this statement in its March 11, 2009 sentencing entry ordering, "[t]he forfeiture of $5,746.00 is held in abeyance until the issue regarding potential third party interest in the property are resolved."

{¶34} R.C. 2981.05, which governs civil forfeiture proceedings, allows a prosecutor to commence a civil forfeiture action. The record reveals that on September 25, 2009, the state, by and through the Trumbull County Prosecuting Attorney, sought

leave to file a "complaint for forfeiture personal property pursuant to O.R.C. 2981.05." The trial court, on September 25, 2009, granted the requested leave. As a result, $5,746 is the subject of a civil lawsuit pending in the trial court, case No. 2009-CV-2570. Although the state has suggested that the issue of forfeiture may not be ripe since the trial court has held the ultimate disposition of the money "in abeyance" pending the outcome of the civil case, this court, in the context of this criminal proceeding and in the interest of judicial economy, is in a position to determine if there was competent, credible evidence to establish whether the state proved the forfeiture as to appellant herein by a preponderance of the evidence.

{¶35} With respect to the money found on Johnson's person, the evidence presented at trial reflected that he was in possession of 202 grams of marijuana. The jury also heard testimony from Trooper Nellist that the money found on Johnson's person was transported separately from the marijuana found in the vehicle, so as to not contaminate the money with the odor of marijuana. Trooper Landers testified to the procedures he underwent when he utilized Darko and to the fact that Darko alerted to the presence of an odor on the money, which indicates it had been in contact with one of the illegal substances. Given the burden of proof, we find that the state provided enough evidence to support the jury's verdict with respect to the forfeiture.

{¶36} Furthermore, as noted by the trial court, the legislature intended a trial court to apply the new forfeiture laws, Chapter 2981, in actions such as the instant case. There are important distinctions between the new and the old forfeiture statute. The old statute, former R.C. 2925.42, provided, in pertinent part:

{¶37} "(A)(1) *** a person who is convicted of *** a felony drug abuse offense *** loses any right to the possession of property and forfeits to the state any right, title, and interest the person may have in that *property* if either of the following applies:

{¶38} "***

{¶39} "(b) The *property* was used or intended to be used in any manner to commit, or to facilitate the commission of, the felony drug abuse offense or act." (Emphasis added.)

{¶40} In enacting R.C. 2981.02, the General Assembly divided "property" into three categories: contraband, proceeds, and instrumentality. Cash or currency, which previously was included in the term "property," is now defined either as "proceeds" or "instrumentality" under the new law. See R.C. 2981.01(B)(6) & (B)(11)(a). Therefore, the proper jury instruction would be directed by the applicable law, R.C. 2981.02(A)(2) and (A)(3), governing proceeds and instrumentality. R.C. 2981.02 states, in pertinent part:

{¶41} "(A) The following property is subject to forfeiture to the state or a political subdivision under either the criminal or delinquency process in section 2981.04 of the Revised Code or the civil process in section R.C. 2981.05 of the Revised Code:

{¶42} "***

{¶43} "(2) Proceeds derived or acquired through the commission of an offense;

{¶44} "(3) An instrumentality that is used in or intended to be used in the commission or facilitation of any of the following offenses when the use or intended use, consistent with division (B) of this section, is sufficient to warrant forfeiture under this chapter:

{¶45} "(a) A felony[.]"

{¶46} With respect to the $5,746 found on Johnson's person, the trial court instructed the jury as follows:

{¶47} "If you find that the State has failed to prove by a preponderance of the evidence that the $5,746.00 in United States currency *was used or intended to be used in any manner to commit or to facilitate the commission* of the Possession of Marijuana, you must find that the $5,746.00 in United States currency is not subject to forfeiture." (Emphasis added.)

{¶48} This appears to be a proper instruction under R.C. 2981.02(A)(3). However, the statute goes on to define what the jury *must* consider when making this finding. R.C. 2981.02(B) outlines the following factors that a trier of fact *shall* consider when "determining whether an alleged instrumentality was used in or was intended to be used in the commission or facilitation of an offense ***:

{¶49} "(1) Whether the offense could not have been committed or attempted but for the presence of the instrumentality;

{¶50} "(2) Whether the primary purpose in using the instrumentality was to commit or attempt to commit the offense;

{¶51} "(3) The extent to which the instrumentality furthered the commission of, or an attempt to commit, the offense."

{¶52} The trial court should have instructed the jury of these additional factors with respect to the issue of forfeiture. However, Johnson's trial counsel did not object nor did Johnson raise this as error on appeal; therefore, appellant has waived all challenges except plain error. *State v. Fields*, 12th Dist. Nos. CA2005-03-067 &

CA2005-03-068, 2005-Ohio-6270, at ¶20. (Citation omitted.) That is, this court will recognize plain error, "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶53} Having considered the totality of the evidence, we cannot say that the decision of the jury would have been different had the trial court outlined the considerations in R.C. 2981.02(B). Consequently, we find that any error in the failure to provide the jury with the instructions outlined in R.C. 2981.02(B) does not warrant reversal.

{¶54} Johnson's second assignment of error is without merit.

{¶55} It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is hereby affirmed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.