[Cite as *State v. Dohm*, 2011-Ohio-1160.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-076**
- vs -	:	
STEVEN F. DOHM,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000605.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Melissa M. Prendergast*, Assistant State Public Defender, 250 East Broad Street. #1400, Columbus, OH 43215-9308 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} After trial by jury, appellant, Steven F. Dohm, was convicted of two counts of drug trafficking in the vicinity of a juvenile and sentenced to the maximum term of imprisonment for each crime. Appellant now appeals his conviction. For the reasons discussed in this opinion, we affirm the judgment of the trial court.

{¶2} In late 2007, on two separate days, appellant sold Confidential Informant 794 ("CI 794") crack cocaine during two controlled drug buys. Special Agent 82 ("SA

82"), of the Lake County Narcotics Agency, oversaw the buys and was the principal liaison between the agency and CI 794 during the transactions.

{¶3} The first controlled purchase occurred on the evening of December 5, 2007, at the River Isle apartment complex in Willoughby, Ohio. On that date, arrangements were made for CI 794 to meet appellant in apartment A16, which belonged to an associate of CI 794, Rob Bernstein. At the time of the incident, CI 794 was also residing in apartment A16 with his fiancé and her three-year-old daughter.

{¶4} Before commencing the buy, SA 82 checked CI 794 for contraband, outfitted the informant with an audio transmitter, provided him with $100 in Lake County Narcotics Agency money to purchase the crack cocaine, and completed certain agency paperwork related to the buy. With respect to the transmitter, SA 82 testified such wires typically permit an investigating officer to hear exactly what a confidential informant hears; the clarity, however, varies depending upon the distance, weather, and building in which the confidential informant makes the purchase.

{¶5} After preparations were completed, SA 82 drove CI 794 to a location approximately 200 yards from the apartment complex. CI 794 exited the vehicle and walked toward "Building A" of the River Isle apartment complex. After entering the building, SA 82 lost sight of CI 794, but could still hear via the transmitter. Once CI 794 was in the building, SA 82 testified he could hear several voices, including that of a young child and a voice CI 794 identified as appellant. While inside the apartment, CI 794 testified appellant gave him a cellophane bag of crack cocaine in exchange for $100. After the transaction, which took approximately three to four minutes, CI 794 then left the building and met SA 82 at a designated meeting location.

{¶6} Once he reunited with SA 82, CI 794 turned over the crack cocaine he had purchased to SA 82. CI 794 was then "debriefed," i.e., he was asked a series of questions about the buy and again searched by SA 82. The two men subsequently drove to another location where SA 82 removed the transmitter. After CI 794 submitted a statement regarding the transaction, he exited SA 82's vehicle and left. Testing confirmed that the drug purchased from appellant was .33 grams of crack cocaine.

{¶7} Several days later, on the evening of December 10, 2007, CI 794 contacted SA 82 indicating he could do another controlled buy at the same apartment building. On this date, the transaction was arranged with the assistance of Rob Bernstein. Similar to the first buy, CI 794 was outfitted with a wire transmitter and given $100 in Lake County Narcotics Agency money to purchase crack cocaine. After being checked for contraband and completing the necessary documentation, CI 794 exited SA 82's vehicle and walked toward the building.

{¶8} Once inside the building, CI 794 was directed to apartment A21 to meet with appellant. Upon entering, CI 794 noticed five children between the ages of three and 12 in the apartment's living room. CI 794 proceeded to a back bedroom where he met appellant and an individual referred to as "Jose" to complete the transaction. CI 794 testified that, upon entering the bedroom, appellant again sold him $100 in crack cocaine. Shortly after the exchange, CI 794 returned to SA 82's vehicle and handed SA 82 the drugs. CI 794 was again debriefed and searched. SA 82 then drove to a different location where CI 794 surrendered the purchased drugs and the transmitter was removed. Testing later confirmed appellant had purchased .78 grams of crack cocaine.

{¶9} On January 5, 2009, appellant was indicted by the Lake County Grand Jury on two counts of trafficking in cocaine, felonies of the fourth degree, each in violation of R.C. 2925.04(A)(1). Appellant entered a plea of "not guilty" to the charges. The matter proceeded to jury trial, after which appellant was found guilty on both counts. He was eventually sentenced to 18 months on each count, to be served consecutively, for a total of three years imprisonment.

{¶10} On December 30, 2010, we filed our opinion and judgment in this matter affirming the trial court's judgment in part, reversing it in part, and remanding the matter. On January 6, 2011, the state filed an application for reconsideration which we granted on February 9, 2011. In doing so, we vacated our December 30, 2010 judgment entry and opinion. We now proceed in light of the issue raised in the state's application for reconsideration.

{¶11} Appellant assigns three errors for our consideration. We shall begin our analysis by addressing appellant's second assignment of error, which provides:

{¶12} "The trial court allowed the State to protect the identity of the confidential informant, whose name was already known to Mr. Dohm, without a valid reason to do so. Protecting the informant's identity provided the jury with the inference that Mr. Dohm was a violent person who would retaliate against him. This ruling violated Mr. Dohm's right to a fair trial and deprived him of Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution."

{¶13} Appellant argues that the trial court erred in permitting the state to keep CI 794's identity confidential in a public trial where the informant's name was already

known to the defendant. According to appellant, there was no compelling reason to conceal CI 794's identity and, in his view, the state's only purpose in moving the court to keep his identity confidential was to improperly bolster the informant's credibility as a witness. We disagree.

{¶14} We first point out that appellant failed to object to the state's request to conceal CI 794's identity during the proceedings and therefore waived all but plain error. The Supreme Court of Ohio has held that "[p]lain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62.

{¶15} Prior to the commencement of trial, the state asked the court to order all parties to refer to the confidential informant as CI 794 "*** so there's not a public record of the Defendant's name - -." In response, defense counsel stated he had no problem with the state's request to the extent CI 794 did not deny his prior convictions at trial. If CI 794 did so, defense counsel stated his identity should be disclosed. The prosecutor represented that he did not anticipate CI 794 would deny his past convictions, "[b]ut certainly if that comes up, then we can revisit the name issue ***."

{¶16} Contrary to appellant's argument, the above exchange suggests the state did have a valid, reasonable foundation for keeping CI 794's name confidential. By keeping his identity off the record, police could still use him as a confidential informant for controlled drug buys in the future. For this reason alone, appellant's argument fails.

{¶17} Appellant nevertheless speculates that the concealment of CI 794's identity on record permitted the jury to infer he is a violent person who might retaliate

against the informant. Given the nature of the case and the evidence submitted at trial, however, we do not believe such an inference is plausible.

{¶18} Appellant was not charged with a crime of violence, and the evidence did not indicate he was a volatile or violent individual. Moreover, there was nothing in the record to suggest appellant had a predisposition to retaliate or "act out" when circumstances did not favor his interests. With these points in mind, the jury could not reasonably infer the concealment of CI 794's identity was to protect the witness from appellant but, rather, to simply protect CI 794's identity for his usefulness as an informant in future cases.

{¶19} Regardless of these points, any potential error which could be ascribed to the concealment of CI 794's identity was invited. "'Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make. ***'" (Citations omitted). *State v. Nievas* (1997), 121 Ohio App.3d 451, 456. Although we believe there was no obvious error in keeping CI 794's identity secret, defense counsel agreed that concealing his identity was not a problem, so long as CI 794 did not deny his past criminal history. CI 794 did not deny his prior convictions. Because no additional reservations were expressed by defense counsel regarding the concealment of the informant's identity, any error issuing from the concealment was invited.

{¶20} Appellant's second assignment of error is overruled.

{¶21} His first assignment of error provides:

{¶22} "The trial court violated Mr. Dohm's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16

of the Ohio Constitution when it convicted him of two counts of trafficking in drugs in the vicinity of a juvenile when that was against the manifest weight of the evidence."

{¶23} A manifest weight challenge concerns:

{¶24} "'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing Black's Law Dictionary (6th Ed. 1990).

{¶25} In short, a manifest weight inquiry analyzes whether the state met its burden of persuasion at trial beyond a reasonable doubt. Id. at 390. In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶26} Appellant argues the jury lost its way in convicting him because CI 794's testimony was inherently unreliable and the state offered no corroborating evidence to buttress CI 794's testimony. In support, appellant argues CI 794 had been previously convicted of "crimes of dishonesty," viz., misdemeanor receiving stolen property in 2002 and felony receiving stolen property in 2005. Moreover, appellant observes the audio tapes of the controlled buys fail to directly implicate him as the seller. Although

appellant's points are factually true, we do not believe they militate heavily against the jury's verdict.

{¶27} The jury heard that CI 794 had been previously convicted of crimes of dishonesty; it also heard that he received $50 for each controlled buy and was a crack cocaine user himself. Nevertheless, CI 794 provided a concise, detailed version of what he observed during the transactions; the most salient point was his identification of appellant as the individual who had the crack and accepted money in exchange for the crack. Moreover, SA 82 bolstered CI 794's testimony by providing corroborating details of the surrounding circumstances of the purchases. SA 82 testified to the official protocol he and CI 794 went through both prior to and after each of the controlled buys. As indicated above, the jury is the arbiter of witness credibility and is responsible for assessing the veracity of a witness. *DeHass*, supra. Although no other eye witnesses were called by the state, we hold there was sufficient, credible evidence on which the jury could rely to support its verdict.

{¶28} Appellant's first assignment of error is overruled.

{¶29} Appellant's final assignment of error alleges:

{¶30} "The trial court unlawfully imposed consecutive terms of imprisonment, when it did not make the findings required by statute."

{¶31} Under his final assignment of error, appellant contends the trial court erred in failing to make factual findings pursuant to R.C. 2929.14(E)(4) prior to imposing consecutive sentences. Appellant specifically asserts the Supreme Court of the United States' decision in *Oregon v. Ice* (2009), 555 U.S. 160 acted to abrogate the Supreme Court of Ohio's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 to the

extent the latter ruled the Sixth Amendment precludes judicial fact-finding as a prerequisite to imposing consecutive sentences. We do not agree.

{¶32} In *Ice*, the Supreme Court determined the Sixth Amendment to the United States Constitution is not violated when a state statute requires a judge, rather than a jury, to make factual findings prior to imposing consecutive sentences for multiple offenses. Id. at 716-720. In *State v. Hodge*, ____ Ohio St.3d ____, 2010-Ohio-6320, the Supreme Court of Ohio was asked to resolve the specific effect of *Ice* on Ohio's post-*Foster* felony sentencing law. The Court framed the issue as follows:

{¶33} "[W]hether, as a consequence of the decision in *Ice*, Ohio trial courts imposing consecutive sentences must first make the findings specified in R.C. 2929.14(E)(4) in order to overcome the presumption for concurrent sentences in R.C. 2929.41(A)." *Hodge*, supra, at ¶9.

{¶34} In answering the question in the negative, the court held:

{¶35} "1. The jury-trial guarantee of the Sixth Amendment to the United States Constitution does not preclude states from requiring trial court judges to engage in judicial fact-finding prior to imposing consecutive sentences. ***

{¶36} "2. The United States Supreme Court's decision in *Oregon v. Ice* *** does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and R.C. 2929.41(A), which were held unconstitutional in *State v. Foster* ***.

{¶37} "3. Trial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new

legislation requiring that findings be made." *Hodge*, supra, paragraphs one, two, and three of the syllabus.

{¶38} Because *Ice* did not automatically revive the requirements of R.C. 292914(E)(4), appellant's argument lacks merit.

{¶39} Appellant's third assignment of error is overruled.

{¶40} One final point requires attention. In *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, this court held that the April 7, 2009 post-*Ice* amendment to R.C. 2929.14, which retained subsection (E)(4), acted to revive the requirement that a judge find certain facts prior to imposing consecutive sentences. Although the issue decided in *Jordan* was slightly different than the primary issue in *Hodge*, a thorough reading of *Hodge* demonstrates this court's disposition of the consecutive sentencing issue in *Jordan* has been overruled. See *State v. Jordan*, ____ Ohio St.3d ____, 2011-Ohio-737 (reversed in part on the authority of *Hodge*, supra.)

{¶41} For the reasons discussed above, appellant's assigned errors are without merit. Thus, the judgment of the Lake County Court of Common Pleas is therefore affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.