[Cite as *State v. Bielecki*, 2012-Ohio-2124.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0087**
- vs -	:	
LUCAS DAVID BIELECKI,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 10 CR 144.

Judgment: Affirmed.

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

Charles E. Dunlap, 3855 Starr's Centre Drive, Suite A, Canfield, OH 44406 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} Lucas David Bielecki appeals from a judgment of the Trumbull County Court of Common Pleas which convicted him of possession of crack cocaine following a bench trial. After reviewing the record and pertinent law, we affirm the trial court's judgment.

Substantive Facts and Procedural History

{¶2} On November 18, 2009, Deputy Andre Jarrett of the Trumbull County Sheriff's Department was working as a private security guard at Stonegate Apartments, an area known as a high drug-activity area. Around midnight, he observed a car pull up next to a minivan, which had been parked in the parking lot. Mr. Bielecki, the passenger in the car, quickly exited the vehicle with a book bag and entered the passenger side of the van. Deputy Jarrett approached the individuals in the two vehicles and asked for identifications. The deputy then ran a record check through dispatch and learned Mr. Bielecki was wanted on a warrant from Niles Municipal Court. He took Mr. Bielecki into custody and confiscated his book bag. Inside the bag Deputy Jarrett found suspected marijuana, rocks of suspected crack cocaine, sandwich bags, a digital scale, some jewelry, and sex toys.

{¶3} Mr. Bielecki was indicted for possession of crack cocaine, in violation of R.C. 2925.11(A)&(C)(4)(b). He filed a motion to suppress evidence, which the trial court denied after a suppression hearing. The matter was tried to the bench after Mr. Bielecki waived a jury trial.

{¶4} At trial, the parties stipulated to a laboratory report from an Ohio Bureau of Criminal Identification and Investigation forensic scientist, Jeffery Houser. The report stated, "Off white substance 3.2 grams found to contain cocaine." Because the report was stipulated to, Mr. Houser did not testify at trial. A bag containing the substance was introduced by the state as an exhibit, and Deputy Jarrett testified as follows:

{¶5} "[PROSECUTOR]: Now I'm going to show you what has been marked for purposes of identification as State's Exhibit No.7. Can you take a look at that?

{¶6} "[DEPUTY JARRETT]: Yes.

{¶7} "Q. Could you tell the Court what that is?

{¶8} "A. It is a baggy containing crack cocaine.

{¶9} "[DEFENSE COUNSEL]: Objection.

{¶10} "* * *.

{¶11} "[DEFENSE COUNSEL]: I do object to [Exhibit] 7. I don't believe that the officer is qualified to say what State's exhibit 7 is. It is some unidentified substance. He's reaching a scientific conclusion that it is crack cocaine. The report that we have stipulated to identifies it as cocaine.

{¶12} "THE COURT: The officer can testify to what it appears from the physical characteristics. As to a conclusion of what it is, I'll sustain the objection.

{¶13} "Q. Officer, do you have any training and experience with regards to the drug cases?

{¶14} "A. Yes.

{¶15} "Q. Have you had occasion to learn at either seminar or training exercise, what crack cocaine looks like?

{¶16} "A. Yes.

{¶17} "Q. Have you had any special training with regards to identifying street drugs?

{¶18} "A. Training we received in the academy and also dealing with drugs on the street with prior cases.

{¶19} "Q. Have you arrested people for possession of crack cocaine?

{¶20} "A. Yes.

{¶21} "Q. Are you familiar with what crack cocaine looks like?

{¶22} "A. Yes.

{¶23} "Q. Does this appear to be crack cocaine to you?

{¶24} "A. Appears to be crack cocaine, yes.

{¶25} "Q. Can you tell the difference between powder and crack cocaine?

{¶26} "A. Yes, powder cocaine is powder.

{¶27} "Q. Explain pretty clearly to the Judge, if you can, for the judge so he can hear you, the difference between powder cocaine and crack cocaine and why you came to the conclusion that this is crack cocaine?

{¶28} "[DEFENSE COUNSEL]: Objection, Your Honor. It calls for a scientific basis.

{¶29} "THE COURT: I think he has a right to testify to what knowledge he uses on a daily basis to make judgments on whether or not he feels that any particular substance may be a drug. I agree with counsel for the Defendant that he cannot testify that it is powder or crack cocaine, but he can testify that whether or not it appears to him that it may be.

{¶30} "[PROSECUTOR]: I want him to explain to you the difference in appearance as well.

{¶31} "THE COURT: As to his knowledge of the difference.

{¶32} "[PROSECUTOR]: That is all I'm asking for, Judge.

{¶33} "Q. Go ahead.

{¶34} "A. In my experience, powder cocaine is in a powder form. Crack cocaine is a rock like substance in a hard rock form.

{¶35} "Q. And this suspected cocaine is in a rock like form?

{¶36} "A. Yes."

{¶37} Mr. Bielecki testified on his own behalf. He claimed the book bag did not belong to him. He stated he and a friend, now-deceased, drove to Stonegate because

his friend was invited to a party there. When they got there, his friend handed him the bag and told him to give it to the van's driver. When asked why his girlfriend's jewelry and sex toys were also found in the bag, Mr. Bielecki could not offer an explanation.

{¶38} The court found him guilty of possession of crack cocaine. In its judgment entry, the court cited *State v. Buck*, 9th Dist. No. 22584, 2006-Ohio-2174, stating,

{¶39} "Although not binding on this Court, the reasoning [in *Buck*] appears valid that the officer's statement [that] the form of the cocaine was crack cocaine and the lab analysis [which] verified it contained cocaine in the amount of 3.2 grams is sufficient to establish the contraband to be crack cocaine."

{¶40} The court ordered a presentence report and subsequently sentenced Mr. Bielecki to 14 months in prison, a six-month license suspension, and three years of optional postrelease control. Mr. Bielecki now appeals, raising the following assignment of error for our review:

{¶41} "The trial court erred in convicting the defendant of possession of crack cocaine, Ohio Rev. Code 2925.11(A)&(C)(4)(b)."

Does the Recent Amendment to R.C. 2925.11 Apply in this Case?

{¶42} Mr. Bieleciki was charged under a statute which makes it illegal to "knowingly obtain, posses, or use Cocaine, a Schedule II controlled substance, and the amount of the drug involved equals or exceeds one gram but is less than five grams of Crack Cocaine, in violation of the Ohio Revised Code, Title 29, Section 2925.11(A)&(C)(4)(b)."

{¶43} We first note that R.C. 2925.11 has been recently amended. Before the amendment, the legislature imposed more severe penalties for possession of crack cocaine than for possession of powdered cocaine, based on the notion that crack

cocaine is more potent than powder cocaine, due to the way it is ingested, and therefore, more dangerous to the user and to society in generally. *See*, *e.g*., *State v. Crisp*, 3d Dist. No.1-05-45, 2006-Ohio-2509, ¶21-22. However, in 2011, the sentencing reforms of H.B. 86, effective September 30, 2011, eliminated any distinction between crack cocaine and powder cocaine, and the statute, as revised, no longer contains a definition for crack cocaine. *See State v. Fields*, 5th Dist. No. CT11-0037, 2011-Ohio-6044, ¶9. Furthermore, Section 3 of H.B. 86 contains the statement of specific legislative intent not to make the amendment retroactive. Section 3 states, "The amendments to sections 2925.01 * * * and 2925.11 of the Revised Code * * * that are made in this act apply to a person who commits an offense involving * * * cocaine on or after the effective date of this act."

{¶44} The effective date of the reforms was September 30, 2011. Mr. Bieleck was sentenced on August 18, 2011. Therefore, the former version of the statute applies in this case.

Prior Statutory Definition of Crack Cocaine and a Sufficiency Challenge

{¶45} Former R.C. 2925.01(GG), defined crack cocaine as "a compound, mixture, preparation, or substance that is or contains any amount of cocaine that is analytically identified as the base form of cocaine or *that is in a form that resembles rocks or pebbles* generally intended for individual use."[1] (Emphasis added.)

1. R.C. 2925.11(X), which is unchanged, defines cocaine as follows: "(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."

{¶46} The trial court found Mr. Bielecki guilty of possession of crack cocaine, based on the lab analysis showing the subject substance contained cocaine and the deputy's testimony that the cocaine was in rock form.

{¶47} On appeal, Mr. Bielecki claims that there was insufficient evidence showing the substance in question was crack cocaine, because there was no lab test indicating such. We disagree, based on our reading of R.C. 2925.01(GG).

{¶48} A sufficiency-of-the-evidence claim challenges whether the state has presented sufficient evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). "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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Whether a conviction is supported by sufficient evidence is a question of law that this court reviews de novo. *Thompkins* at 386.

{¶49} The statutes define cocaine as having a specific chemical make-up, but define crack cocaine as being or containing "any amount of cocaine that is analytically identified as the base form of cocaine or *that is in a form that resembles rocks or pebbles* generally intended for individual use."

{¶50} Here, the state produced sufficient evidence showing the substance was crack cocaine: the stipulated lab report found the substance weighed 3.2 grams and

contained cocaine, and Deputy Jarrett testified that the substance was in a rock-like form. Pursuant to former R.C. 2925.01(GG), therefore, there was sufficient evidence showing the substance at issue was crack cocaine.

{¶51} Two other courts that have addressed this issue read the statute similarly. In *State v. Buck*, *supra*, the Ninth District stated that "R.C. 2925.01(GG) provides that crack cocaine is a substance in rock form that contains or is a mixture of cocaine." In that case, as in the instant case, the stipulated lab results found that the substance at issue weighed 0.87 grams and contained cocaine, while an officer testified that he observed four rocks of crack cocaine near the defendant. The defendant argued the state failed to prove the substance involved was crack cocaine. The Ninth District held that there was sufficient evidence that the drug involved was crack cocaine based on the evidence presented.

{¶52} The Eighth District reached the same result in *State v. Wilson*, 156 Ohio App.3d 1, 2004-Ohio-144, ¶26 (8th Dist.). The defendant there contended a separate test should have been performed to prove the substance in question was crack cocaine. The Eighth District disagreed. Citing the statutory definition of crack cocaine, it held the state only had to prove that the substance contained cocaine and was in a form that looked like individual use rocks or pebbles.[2]

2. Mr. Bielecki cites *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, for the necessity of a separate lab test in proving the existence of crack cocaine. That case is distinguishable, however. There, the arresting officers testified that the baggie found during the search of the defendant's vehicle contained a white, powdery substance, which field tested positive for cocaine. The police crime analyst testified likewise that the substance tested was cocaine. A separate test for crack cocaine was not performed and the analyst testified that he could not say that the substance was crack cocaine because he did not perform the test to determine if the substance was crack cocaine. Based on the testimony, the court concluded the state failed to provide sufficient evidence to prove the substance was crack cocaine, as opposed to cocaine. *Banks* is distinguishable from *Buck*, *Wilson*, and this case, because there was no testimony that the substance was in rock form.

{¶53} We are in agreement with the Ninth and Eighth Districts' interpretation of former R.C. 2925.01(GG) as to the state's burden of production regarding the proof for crack cocaine. Here, the stipulated lab report showed the substance was cocaine and the deputy testified the substance was in rock form. Such evidence was sufficient to support a conviction of possession of crack cocaine; viewing the evidence in a light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that the substance at issue was crack cocaine. The assignment of error is without merit.

{¶54} Judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.