[Cite as *State v. Wilkerson*, 2008-Ohio-4750.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 22693
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2007-CR-3686
v.	:	
	:	(Criminal Appeal from
TOMMIE WILKERSON	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	
	:	

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O P I N I O N

Rendered on the 19th day of September, 2008.

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BROGAN, J.

{¶ 1} Why is a person convicted of possessing five grams of crack cocaine punished with a mandatory prison sentence but one convicted of possessing five

grams of powder cocaine is not? Ohio believes that crack is more dangerous, but Tommie Wilkerson contends that there is no reasonable basis for this belief. We examine the issue to see if he is right.

{¶ 2} The Montgomery County Common Pleas Court convicted Wilkerson of possessing crack cocaine, enough for a mandatory prison sentence under Ohio's criminal code.[1] But the criminal code would not have sent him to prison had he been caught with powder cocaine. He contends that this disparity is irrational and violates the equal protection clause and due process clause of the United States and Ohio constitutions. We are not convinced. Wilkerson also argues that the police violated his Fourth Amendment rights when, upon feeling an object in his pocket during a lawful pat-down, the officer asked him, "What's this?" Again, we disagree. Wilkerson was not obligated to respond, "Just weed."

I

{¶ 3} The events precipitating this appeal began on September 6, 2007, in the early morning hours. Around 2:15 AM, two police officers on routine patrol in a high-

[1] Wilkerson confusingly states on page four of his brief that he was convicted of selling crack cocaine, though he gets it right on the first page. Our review of the record confirms that he was convicted of possessing, not trafficking, crack cocaine.

crime part of Dayton saw Wilkerson riding his bicycle down a one-way street–the wrong way and without a light. The officers stopped him without incident. As they approached him, Wilkerson abruptly turned and side-stepped left while moving his left hand down toward the back pocket of his shorts. Worried that he was reaching for a weapon, one of the officers grabbed Wilkerson's arm and told him to put his hands in the air. The officer then began to frisk him, feeling for weapons. The officer's fingers ran over a curious bulge in the back pocket of Wilkerson's shorts. He could not tell what it was, so he asked, "What's this?" Wilkerson plaintively confessed, "It's just weed." Upon hearing this, the officer removed the object and handed it to his partner. He finished frisking Wilkerson but found no weapon. The object turned out to be more than just marijuana–the officer also discovered crack cocaine.

{¶ 4} A week later, he was indicted on one count of possessing between five and ten grams of crack cocaine, a third-degree felony. See R.C. 2925.11(C)(4)(d). (The record does not reveal whether he was also charged with possession of marijuna–a misdemeanor.) Wilkerson filed a motion asking the trial judge to suppress all the evidence against him based on his assertion that the officers lacked probable cause to stop him while he was riding his bicycle. The judge, after a hearing, disagreed and refused to suppress any evidence. Ultimately, Wilkerson pleaded no contest to the charge.

{¶ 5} The criminal code prescribes a mandatory sentence as the penalty for third-degree crack possession offenses. Wilkerson filed a lengthy sentencing memorandum in which he contrasted the penalty for his offense with the penalty for possessing the same quantity of powder cocaine. The latter offense, he pointed out, is

not penalized with a mandatory sentence. The harsher punishment meted out to crack-cocaine offenders, he argued, violates the equal protection and due process clauses of the United States and Ohio constitutions. The trial judge, evidently rejecting his argument, sentenced him to the mandatory minimum sentence of one year in prison.

{¶ 6} Wilkerson assigns two errors, one to his sentence and the other to the trial judge's refusal to suppress the evidence against him.

II

{¶ 7} Wilkerson states his first assignment of error this way:

{¶ 8} "THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE VERY RECENT U.S. SUPREME COURT PRECEDENT SUGGESTS THAT OHIO'S SENTENCING SCHEME, WHERE PURVEYORS OF CRACK COCAINE ARE TREATED MORE PUNITIVELY THAN SELLERS OF THE EQUAL AMOUNT OF POWDERED COCAINE, CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY."

{¶ 9} Ten years ago, in *State v. Bryant*, Mont. App. 16809, 1998 WL 399863, we addressed the constitutionality of the criminal code's crack/powder disparity under the equal protection clause of the United States and Ohio constitutions. There, we held that the disparity did not violate the equal protection clause of either constitution. Rather, we found that crack and powder cocaine differed in their "addictive impact" on

the individual and society. Crack's impact was greater than that of powder cocaine. We found that this difference was a rational foundation on which the General Assembly could premise disparate penalties. Wilkerson concedes our holding in *Bryant* but argues that empirical research conducted on cocaine and sentencing policy since calls it into question. He asserts that in light of this research it no longer makes sense to punish crack-cocaine offenders more severely than powder-cocaine offenders because the differences between the drugs are not as originally believed. Our situation here brings to mind an observation made by Judge Calabresi: "It is not . . . easy for courts to step in and say that what was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge." *U.S. v. Then* (1995), 56 F.3d 469, 468 (Calabresi, J., concurring). Mindful of this, we endeavor here to consider carefully the new knowledge that has come out of a decade's worth of research to see if what was rational still is.[2]

{¶ 10} Not without good reason, many obstacles are placed in the way of a party who seeks to have a reviewing court declare a statute unconstitutional. Wilkerson is no exception. He must first overcome the strong presumption in favor of constitutionality. See *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 926. If he surmounts this obstacle, Wilkerson must then prove that the statute's unconstitutionality is beyond reasonable doubt. See *id*. The standards we use to

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[2] This same issue was presented to us in *State v. Fritz*, Mont. App. No. 22377, 2008-Ohio-4389, a case that was before this court at the same time as Wilkerson's. In *Fritz*, the issue was not preserved in the trial court, so, with limited discussion, we rejected the constitutional argument based on our holding in *Bryant*. Here, the issue is properly before us so we engage in a lengthier, more complete analysis. Our decision in *Fritz* with respect to this issue is a product of our analysis here.

evaluate his arguments are basically the same for the U.S. and Ohio constitutions. To persuade us that the statute violates the equal protection clause,[3] he must prove that the statute's penal disparity "bear[s] no relation to the state's goals and no ground can be conceived to justify them." *Id*. at 561. The standard he must meet to persuade us of a due process clause violation is to show that there is no "rational relationship between the statute and its purpose." *Id*. In essence, he must prove that there is no longer a reason to penalize crack offenses more severely than powder offenses.

{¶ 11} The origin of Ohio's crack/powder disparity is found in the massive overhaul of Ohio's criminal code that took effect in 1996, following the passage of Senate Bill 2. Until then, felony sentencing by Ohio courts was indeterminate. Senate Bill 2 changed that by ushering in the concept of "truth in sentencing." The general purpose "was to introduce certainty and proportionality to felony sentencing." *State v. Foster* (2006), 109 Ohio St.3d 1, 12, 845 N.E.2d 470 . To aid it in drafting the bill, the General Assembly created the Ohio Criminal Sentencing Commission (Ohio Commission) to study the issues and make recommendations. After extensive study, the Ohio Commission offered its recommendations in a comprehensive report. See A Plan for Felony Sentencing in Ohio (July 1993) (Ohio Report). Many of its recommendations concerning cocaine offenses and sentencing were adopted by the

[3] He does not contend that the General Assembly had a discriminatory intent in enacting this statute, nor does he contend that any disparate impact lacks race-neutral justification.

General Assembly and enacted into law.

{¶ 12} The seriousness of cocaine-possession offenses, which are always felonies, is a matter of degrees. An offense is designated one of five degrees, F-5 through F-1, based on its relative seriousness. The proxy for seriousness is the quantity of cocaine involved. Each successive degree is reached by meeting a successively higher drug quantity threshold. See R.C. 2925.11(C)(4). For penal purposes, the degrees are grouped by relative seriousness: no presumption of prison for F-5, a presumption for prison in the case of F-4, and a mandatory prison term for offenses that are F-3, F-2, or F-1.

{¶ 13} "For Criminal Sentencing purposes, powder cocaine and crack cocaine are different drugs." Ohio Report 40. The quantity thresholds are lower for crack cocaine than they are for powder cocaine. The powder/crack quantity threshold ratios range from 2:1 to 20:1. Crack's lower quantity thresholds result in harsher penalties for crack offenders when compared with powder offenders. But this is the intended result for four reasons: "(1) Crack is cheaper and faster acting than powder–experts say it is more addictive; (2) Crack is linked to much more violence; (3) Crack is more often the subject of complaints to law enforcement; and (4) Crack is doing grave harm to inner-city communities and expert testimony before the Commission indicates that it is spreading." *Id*. Thus, crack is punished more severely because, relative to powder, its negative individual and social effects are more pronounced.[4] A similar rationale

[4] According to the executive director of the Ohio Criminal Sentencing Commission, while it was working on S.B. 2 "legislators and individual citizens from inner city areas asked [them] to get tougher on crack offenders because of its intensity and impact on inner city neighborhoods." Also, "[a]t the time," continued the director, "law enforcement officers reported that they were receiving more calls regarding crack

undergirds the harsher punishment of crack offenders under federal law.

{¶ 14} The federal crack/powder disparity preceded Ohio's with the passage of the Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841. Although there is little legislative history available concerning this Act, based on the few statements by individual legislators, it appears that Congress, like Ohio's General Assembly, believed that crack was more dangerous and associated with greater individual and social harms than was powder cocaine. See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 118 (May 2002) (2002 Report). Congress believed, as did many others at the time, that crack was leading a parade of horribles into a national drug-abuse epidemic. See *id*.

{¶ 15} The Act imposed mandatory minimum sentences for cocaine offenses, trying to target those responsible for the problem–a ten-year minimum targeting major traffickers and a five-year minimum targeting serious and mid-level traffickers. See 21 U.S.C. § 841(b)(1). Each mandatory minimum was triggered by reaching a certain drug quantity threshold. Because crack use was considered relatively more serious than powder cocaine use, Congress, like the General Assembly, decided to punish crack offenders more severely by making the threshold quantities for crack offenses

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cocaine than for powder cocaine offenses." Minutes of the Criminal Sentencing Commission and the Criminal Sentencing Advisory Committee (December 20, 2007).

lower. See 2002 Report 118-119. Though the rationales behind the crack/powder threshold disparities were similar, the disparities themselves differed radically. Congress went far beyond Ohio in creating a quantity threshold difference of a whopping 100-to-1.

{¶ 16} After the Act passed, the U.S. Sentencing Commission (Commission) had the responsibility to develop sentencing guidelines for cocaine offenses. Using only the 100:1 ratio as a ruler, the Commission measured up and down from the mandatory minimum thresholds to construct a table that covered all drug quantities. See USSG § 2D1.1(c). Not until the table was already in use, however, did the Commission begin to empirically research cocaine sentencing policy. It soon found, much its dismay, that the 100:1 disparity bore little relationship to differences that actually existed between the two forms of cocaine. The data showed that the disparity significantly overstated the relative seriousness of crack offenses. See 2002 Report 91.

{¶ 17} Since it reached this conclusion, the Commission has repeatedly urged Congress to reduce the disparity–substantially. It has done so chiefly in four formal reports with the most recent one released in 2007.[5] Each report contained new research corroborating the Commission's conclusion that assumptions about the relative harmfulness of crack and harmful associated conduct were unfounded. The Commission's findings and recommendations in these reports warrant considerable

[5] It also included amendments to the sentencing guidelines promulgated by the Commission. Because Congress did not act, the amendments took effect by operation of law in September 2007. They reduced the sentencing disparity in the guidelines to a range of 20:1 to 80:1.

credence. The Commission has the ability to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough v. U.S* (2007), ___ U.S. ___, 128 S.Ct. 558, 574. In compiling its 2007 report, the Commission considered statements and heard expert testimony from the Executive Branch, federal judiciary, defense practitioners, state and local enforcement officials, medical treatment experts, academicians, social scientists, and community representatives. It also sifted through thousands of written comments made by the public. See 72 FR 28558, *28572-3. Its conclusions, therefore, are based on a comprehensive review of, it would seem, all the available data and information relevant to the crack/powder penal disparity. What follows are, in pertinent part, its findings and recommendations drawn principally from the 2007 report.

{¶ 18} Crack cocaine and powder cocaine are the same drug. They are pharmacologically identical. That is, they have the same chemical composition, have the same uses, and produce the same physiological and psychotropic effects. Neither is physically addictive, though research shows that use of either can create a psychological addiction. Powder cocaine is usually snorted, but, less common, it can be dissolved in water and injected. 2002 Report 12. Crack, on the other hand, is heated in a glass pipe and smoked. *Id*. at 13. Studies show that the intensity of cocaine's effects depends on how much and how fast it reaches the brain. *Id*. at 20. Studies also show that smoking crack cocaine allows the body to absorb the cocaine much more quickly than snorting powder does. *Id*. at 20-21.

{¶ 19} It turns out that the faster absorption rate makes crack more addictive. Smoking cocaine in the form of crack maximizes its effects, giving users a more

intense but shorter lasting high. Those who have used both forms reported that they have a slight preference for the crack high. See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 63 (May 2007) (2007 Report). Much more so than powder, crack "may intensify cravings and compulsions to obtain more of the drug." *Id*. at 67. This is significant because the frequency of cocaine use is directly related to the risk of developing a psychological addiction. As a result, "smoking crack cocaine causes a much greater risk of addiction than does snorting." *Id*. at 65.

{¶ 20} Because crack is more addictive, the individual and social impact of crack is greater than that of powder cocaine. The individual impact of "chronic, heavy use" is significant. See Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties iv (March 2002) (2002 Analysis). The cravings that crack creates can lead some users to stay high "for days at a time–until either they, or their drug supply, are fully exhausted." *Bryant*, Mont. App. No. 16809, at *3. This leads to rapid personal deterioration of the individual crack user. 2007 Report 67.

{¶ 21} Society also suffers more from crack addiction. The social impact includes increased use of weapons and violence to obtain either the drug or money to buy the drug. Indeed, the report reveals that crack offenders are twice as likely to use a weapon–32.4% of the time in crack offenses versus 15.7% for powder. *Id*. at 33. Not surprisingly, crack offenders are also more likely to receive weapon enhancements (statutory or guideline) to their sentences–26.5% of the time compared with 13.0% for powder. *Id*. at 35.

{¶ 22} Crack offenses also involve higher levels of violence. The 2007 report

reveals that violence occurs in 10.4% of crack cases compared with 6.2% of powder cases. Even looking more narrowly, actual injury occurs in 5.5% of crack cases versus just 3.1% of powder cases. *Id*. at 36. Crack offenders typically have a more extensive criminal history than do powder offenders. *Id*. at 44. Additionally, while powder offenders generally are subject to more factors that decrease their sentences, crack offenders generally are subject to more factors that increase them. *Id*. at 60.

{¶ 23} Research has found that, because of the disparate impact it has on minorities, the penal disparity fosters disrespect and encourages a lack of confidence in the justice system. *Id*. at 8. Demographically, it has historically been the case, and remains so, that a majority of crack offenders were African-American. *Id.* at 15. Indeed, according to data from 2000, 85% of crack offenders were African American, while only 30.5% of powder offenders were. 2002 Analysis 6. Since 1992, however, the proportion of black crack-offenders has been steadily declining while the proportion of white crack-offenders has been steadily increasing. 2007 Report 15. Curiously, among powder offenders, Hispanics are the growing proportion with the white proportion experiencing a corresponding decrease. *Id*.

{¶ 24} Wilkerson distills this data into three arguments: there are far fewer differences in crime and violence levels associated with the two forms of cocaine than was originally assumed; research has failed to discern a difference in the pharmacology; and, as a result of the disparate impact that the higher crack-offense penalties have on minorities, the disparity serves only to increase "public scorn" of the judicial system by reinforcing the belief that the justice system is racially biased. Indeed, he avers, the U.S. Supreme Court recognized all this in *Kimbrough v. U.S*

(2007), ___ U.S. ___, 128 S.Ct. 558, and there signaled its belief that the federal crack/cocaine disparity is unconstitutional. It follows, he concludes, that Ohio's disparate punishment of crack and powder cocaine offenses is likewise unconstitutional.

{¶ 25} Taking up his argument, we note first that Wilkerson's reliance on *Kimbrough* is entirely misplaced. *Kimbrough* contains general discussions of concerns about disparity in sentencing between powder cocaine and crack cocaine offenses, but it does not so much as suggest that the disparity is unconstitutional. But more importantly, the conclusion that he draws from the data and information is fallacious. The research shows only that the disparity "significantly overstates the differences between the two forms of the drug." *Id*. at 568. This is why "the Commission recommended that the ratio be substantially reduced." *Id*. (citations omitted). But, the Commission does not recommend eliminating the disparity entirely. Observed the Supreme Court in *Kimbrough*: "the Commission's most recent reports do not urge identical treatment of crack and powder cocaine. In the Commission's view, some differential in the quantity-based penalties for the two drugs is warranted because crack is more addictive than powder, crack offenses are more likely to involve weapons or bodily injury, and crack distribution is associated with higher levels of crime." *Id*. (citations omitted).

{¶ 26} Wilkerson simply has not demonstrated the absence of substantive differences between crack and powder cocaine use. It is clear that although the two forms are pharmacologically identical, crack's enhanced addictiveness results in negative individual and social effects that are greater than those associated with

powder cocaine. This differing addictive impact formed the basis of our decision in *Bryant*, where we said, "[i]n our view, the General Assembly's evident conclusion that an equivalent amount of crack cocaine, as statutorily defined, is more potent, because of the way that it is ingested, than powder cocaine, and therefore is more dangerous to the user, and to society generally, is . . . a real, substantial concern, justifying stricter penalties for drug offenses involving crack cocaine." *Bryant,* Mont. App. No. 16809*,* at *4. Wilkerson needed to convince us that this view is now wrong. He did not do so.

{¶ 27} We cannot conclude, on this record, that the General Assembly is acting irrationally by punishing crack offenses more severely than powder offenses. The disparate penalties are not arbitrarily imposed but based on a rational effort to improve the health and welfare of individuals and society. The harsher penalties are not unfair but are rationally related to the Legislature's goals of punishing crack offenses in proportion to their greater relative seriousness and of curbing the use and abuse of a relatively more dangerous drug. Reasonable people can disagree on the effectiveness of this approach. But we do not think that they can dismiss the approach as irrational when they consider the U.S. Sentencing Commission's consistent findings on the subject. Therefore, we reaffirm and extend our holding in *Bryant* by concluding that Ohio's harsher penalties for crack cocaine offenses do not violate either the equal protection clause or the due process clause of the U.S. or Ohio constitutions. Wilkerson's first assignment of error is overruled.

III

{¶ 28} His second assignment of error reads:

{¶ 29} "THE CONVICTION SHOULD BE REVERSED BECAUSE THE TRIAL COURT SHOULD HAVE SUSTAINED THE MOTION TO SUPPRESS, IN VIOLATION OF THE FOURTH AMENDMENT."

{¶ 30} In his motion to suppress, Wilkerson argued that the officers had no probable cause to stop him while he was riding his bicycle. In his argument to us, though, he concedes that the stop was not unlawful. He argues only that the officer violated his Fourth Amendment rights when, during a lawful frisk, the officer asked him what the object was in his back pocket. Wilkerson is laudably clear that he is contesting only the propriety of the officer's question. Unfortunately for him, by being so clear, he makes it clear to us that he did not raise this issue before the trial court. It is well-known that an appellant cannot raise a new issue on appeal. See *In re M.D.* (1988), 38 Ohio St.3d 149, 151, 527 N.E.2d 286 (1988). Nevertheless, we will briefly consider his argument to show that even were the issue properly before us, we would find no violation.

{¶ 31} Frisking a suspect for weapons is permitted solely to protect police officers. See *State v. White* (1996), 110 Ohio App.3d 347, 674 N.E.2d 405. To this end, the frisk may be used by officers solely to find weapons; police may not use it to search for evidence of crime. When an officer feels something underneath a suspect's clothing, he must decide whether the object feels like a weapon. If it does, he is permitted to retrieve it. But, if the officer knows or should know that the object is not a weapon, he may not retrieve it. See *State v. Evans* (1993), 67 Ohio St.3d 405, 618

N.E.2d 162.

{¶ 32} The Constitution does not require a silent encounter between the police officer and the suspect. See *Berkemer v. McCarty* (1984), 468 U.S. 420, 434, 104 S.Ct. 3138. But neither is the suspect constitutionally obligated to answer the questions put to him, and the refusal to answer does not give the officer probable cause to arrest the suspect. See *Terry v. Ohio* (1968), 392 U.S. 1, 34, 88 S.Ct. 1868. Nor does Ohio law require a response, because the refusal to cooperate with police is not a punishable offense. See *State v. McCrone* (1989), 63 Ohio App.3d 831, 580 N.E.2d 468.

{¶ 33} The officer testified that he did not know what the object in Wilkerson's back pocket was, so he asked. Notably, it was not until after Wilkerson admitted the identity of the object (illegal drugs) that the officer retrieved it. Because Wilkerson was not obligated to respond to the officer's question, nor was he ordered, coerced, or otherwise forced to identify the object, his response was freely given. See *State v. Gaston* (1996), 110 Ohio App.3d 835, 841, 675 N.E.2d 526. The second assignment of error is Overruled.

IV

{¶ 34} Overruling both of Wilkerson's assignments of error, we affirm the judgment of the trial court.

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DONOVAN, J., and WALTERS, J., concur.

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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