[Cite as *State ex rel. Stern v. Butler*, 2001-Ohio-3404.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO, EX REL. STEPHEN STERN, PROSECUTING ATTORNEY	)	**CASE NO. 98-JE-54**
PLAINTIFF-APPELLEE	)	
VS.	)	**O P I N I O N**
GWENDOLYN BUTLER, d.b.a. SAFARI LOUNGE, ET AL.	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	**Civil Appeal from Jefferson County Court of Common Pleas, Jefferson County, Ohio Case No. 97 CV 518**
JUDGMENT:	**Affirmed.**

APPEARANCES:

For Plaintiff-Appellee:	**Atty. Bryan Felmet Prosecuting Attorney Atty. Christopher D. Becker Asst. Prosecuting Attorney 16001 State Route 7 Steubenville, Ohio 43952**
For Defendant-Appellant:	**Atty. Milton Hayman 700 Bank One Building P.O. Box 4308 Steubenville, Ohio 43952 Atty. Charles J. Porter Brucker, Schneider & Porter 225 Ross St., Second Street**

Pittsburgh, PA 15219

JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: September 26, 2001

WAITE, J.

{¶1} This timely appeal arises from a civil nuisance complaint filed against Appellant, Gwendolyn Butler, d.b.a. Safari Lounge. The trial court filed a judgment entry finding the Safari Lounge to be a nuisance. As a result, the trial court ordered that it be padlocked for one year and ordered the sale of all personal property used in connection with the business, with the proceeds forfeited to the State. For the following reasons, we affirm the judgment of the trial court.

{¶2} Liquor enforcement agents from the Ohio Department of Public Safety conducted an undercover investigation of the Safari Lounge ("the bar") in Steubenville, Ohio, from August, 1997, through December, 1997. Agents visited the bar between forty and sixty times and witnessed numerous liquor violations and felony drug activities. The agents also purchased drugs on several occasions from bar employees, patrons and Appellant's stepson. On December 12, 1997, liquor enforcement agents and Jefferson County sheriff's deputies raided the bar. Two customers were arrested

for possession of marijuana. The investigation resulted in the indictment of nine people, some on multiple counts.

{¶3} On December 12, 1997, the Jefferson County prosecutor filed a complaint alleging that the bar was a nuisance pursuant to R.C. Chapter 3767. The trial court issued a temporary restraining order which closed and padlocked the bar. On February 19, 1998, the trial court filed an order granting a preliminary injunction on the same terms as the temporary restraining order. Following a hearing, the trial court filed a judgment entry on November 5, 1998, finding the bar to be a nuisance. The court ordered the bar padlocked, imposed a three hundred dollar fine, ordered all personal property to be sold and the proceeds forfeited to the State and ordered defendants to pay court costs.

{¶4} On December 1, 1998, Appellant filed her notice of appeal. Her first assignment of error alleges:

{¶5} "THE COURT ERRED IN FINDING THAT DRUG OFFENSES WERE CHRONIC IN THE SAFARI LOUNGE."

{¶6} In her brief, Appellant states that in order to establish a nuisance, the State bears the burden of proving by clear and convincing evidence that felony violations of R.C. Section 2925 chronically occur on the property subject to abatement. For support, Appellant relies on *State ex rel. Miller v. Anthony* (1995), 72 Ohio St.3d 132.

{¶7} In its November 5, 1998, order, the trial court stated:

{¶8} "The general test for determining whether a bar is a nuisance hinges on whether or not violations are 'chronic'. The word 'chronic' is not defined in the statute, but is defined in Webster's Dictionary, as 'marked by long duration or frequent occurrence * * * Always present or encountered * * *.' The Court finds that the drug offenses were a chronic problem at the Safari Lounge."

{¶9} According to Appellant, the evidence presented did not satisfy the court's definition. Appellant states that on 80% of their visits, liquor agents did not document any illegal activity and that for the entire period of the investigation there was no documented violence. Appellant also points to the testimony of bar patrons who stated that they never witnessed any drug activity at the bar. Appellant further argues that at the time police raided the bar, only two patrons were found to be in possession of drugs. Based on the record herein, however, this assignment of error lacks merit.

{¶10} Despite the phrasing of her assignment, Appellant actually argues that the trial court's judgment was against the weight of the evidence with respect to finding that the bar be declared a nuisance. It is well-settled that judgments supported by some competent, credible evidence fulfilling all the material elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus of the court. Reviewing

courts must give every reasonable presumption in favor of the lower court's judgment and finding of facts. *Gerijo, Inc. v. Fairfield* (1994), 70 Ohio St.3d 223, 226. In the event that the evidence can be given more than one interpretation, it must be construed consistently with the lower court's judgment. *Id.* Moreover, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 162.

{¶11} R.C. §3719.10 states, "[p]remises or real estate, including vacant land, on which a felony violation of Chapter 2925. or 3719. of the Revised Code occurs constitute a nuisance subject to abatement pursuant to Chapter 3767. of the Revised Code." The Ohio Supreme Court has held that the State's offer of clear and convincing evidence that felony violations of R.C. Chapter 2925 chronically occur on a parcel of property is sufficient to establish that a nuisance exists on such property subject to abatement in accordance with R.C. §3719.10. *State ex rel. Miller v. Anthony, supra,* 140. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be

established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶12} Appellant has interpreted *State ex rel. Miller v. Anthony, supra*, to stand for the proposition that clear and convincing evidence of chronic drug activity is mandatory for a declaration of nuisance. She claims that since drug activity was not observed 80% of the time, the activity cannot be chronic. In so doing, she glosses over the 20% of the time drug activity and other illegal activity was observed. However, the Ohio Supreme Court has clearly stated that evidence of felony drug activity is one type of chronic activity deemed sufficient for a declaration of nuisance. *Id.*, 140. In fact, the relevant controversy in *Anthony* was whether, "* * * the present-tense verb 'occurs' requires the state to demonstrate that a felony violation of R.C. Chapter 2925 'was occurring' * * * at either the time of the filing of the complaint or the time of the hearing in order for a nuisance subject to abatement to exist." *Id.*, 139. The *Anthony* court found such interpretation to be too restrictive and that the legislature intended the word "occurs" to include habitual action. *Id.*

{¶13} In the matter before us, the State presented competent and credible evidence of habitual actions constituting violations of R.C. Chapter 2925. The State offered evidence that pursuant to

the investigation at the bar, eight individuals were convicted of a total of fifteen drug trafficking offenses in violation of R.C. Chapter 2925. (State's Exhibits 1-7). Accordingly, we overrule Appellant's first assignment of error.

{¶14} Appellant's second assignment of error alleges:

{¶15} "THE COURT ERRED IN FINDING THAT THE LACK OF KNOWLEDGE OR PARTICIPATION OR ACQUIESCENCE ON THE PART OF THE SAFARI LOUNGE OWNERS WAS IRRELEVANT."

{¶16} In the order appealed, the trial court stated that it was irrelevant for purposes of forfeiture that none of the drug transactions took place in the actual presence of the bar's owners. The trial court relied on *Bennis v. Michigan* (1996), 516 U.S. 442, wherein the United States Supreme Court held that a property owner's lack of participation and lack of knowledge of the offense was no defense to a civil forfeiture. In that case, a husband solicited a prostitute while driving his wife's automobile. The United States Supreme Court upheld the forfeiture of the wife's automobile even though she was not present, was not aware of the offense and did not condone the offense.

{¶17} Appellant now argues that the trial court erred in applying *Bennis v. Michigan* in light of the Ohio Supreme Court's decision in *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116. In *Rezcallah*, the Ohio Supreme Court held that R.C. §3767.02

does not require proof of an owner's knowledge, acquiescence or participation in the creation or perpetuation of a nuisance to find the owner guilty of maintaining a nuisance. *Id.*, paragraph one of the syllabus. However, the *Rezcallah* court also discussed the penalties involved with such a finding. R.C. §3767.06(A) requires that upon finding a nuisance, the property is to be closed against its use for any reason for one year. This requirement, held the Court, is unconstitutional when it is applied to an owner who did not, "* * * negligently or knowingly acquiesce to, and did not participate in the creation or perpetuation of the nuisance." *Id.*, paragraph two of the syllabus. Appellant argues that in her case there is no evidence that she participated in or had knowledge of any illegal activity constituting the nuisance or of the criminal history of some of her employees.

{¶18} We agree with Appellant that the trial court should have followed *State ex rel. Pizza v. Rezcallah*, *supra*. We recently applied *Rezcallah* when considering a similar appeal in *Youngstown v. McDonough* (December 12, 2000), Mahoning App. No. 00 CA 19. However, the trial court's citation error does not rise to the level of reversible error. A reviewing court will not reverse a correct judgment merely because a lower court assigned erroneous reasons as the basis of the judgment. *Buoscio v. Bagley* (2001),

91 Ohio St.3d 134, 135. This Court has stated that, "[w]e are to review judgments, not the reasons given for them." *Van-American Ins. Co. v. Schiappa* (1999), 132 Ohio App.3d 325, 333.

{¶19} In the present matter, the record supports a conclusion that Appellant acquiesced to the wrongdoing and did not take action to abate the nuisance. On October 10, 1997, while working behind the bar, barmaid Tonya Burns agreed to sell powder cocaine to Liquor Enforcement Agent Deborah Adkins. (Tr. p. 26). That transaction was completed in the restroom of the bar. (Tr. p. 26). On October 18, 1997, Adkins asked Burns for powder cocaine. Burns contacted another employee of the bar, Nathan Huff, who delivered a bindle of cocaine to the agent. (Tr. p. 33). On October 25, 1997, Adkins purchased powder cocaine from bar patron Gary Williams. (Tr. pp. 35-36). Williams was a bar employee at the time agents began investigating the bar. (Tr. p. 135). On November 15, 1997, Adkins purchased a rock of crack cocaine from bar patron Norman Crease. (Tr. p. 37-38). That transaction occurred in plain view of a bartender. (Tr. p. 38). On December 6, 1997, Adkins purchased cocaine from Huff who at the time was working at the door of the bar. (Tr. p. 39).

{¶20} On August 25, 1997, and on October 4, 1997, Liquor Control Agent Robert Anderson purchased marijuana from bar patron Little N. Barker. (Tr. pp. 125-126). On November 9, 1997, and on

November 15, 1997, Anderson purchased cocaine from Cordell Priester, the son of the bar's co-owner, John Butler. Butler is Appellant's husband and Priester is her stepson. (Tr. pp. 128-131). Both transactions began inside the bar and were completed outside the bar. (Tr. pp. 129-130). On November 16, 1997, Anderson approached bar patron Aaron Dwayne Hill inside the bar where Anderson asked if Hill would sell him crack cocaine. (Tr. pp. 131-132). Hill directed Anderson to follow him to his car were Anderson purchased a rock of crack cocaine from Hill. (Tr. p. 132). Anderson also purchased crack cocaine from Hill directly outside of the bar on November 22, 1997. (Tr. pp. 132-133). On December 5, 1997, Anderson purchased crack cocaine and marijuana from bar patron Brian Brown in the restroom of the bar. (Tr. pp. 133-134). On November 15, 1997, Anderson observed bar patron Dan Thompson sell crack cocaine to Norman Crease who in turn sold it to Agent Adkins as described earlier. (Tr. pp. 135-136).

{¶21} Appellant testified that she was the majority owner of the bar and that she was the liquor permit holder. (Tr. p. 153). Appellant stated that her husband and part owner of the bar, John Butler, was operating the bar while she was ill and that she also hired Nathan Huff to operate the bar. (Tr. p. 153). Appellant's husband was in or around the bar at almost all times the preceding activity was taking place. In addition, Appellant testified that

Huff was a relative of her husband. (Tr. p. 170-171). Appellant claims she was not aware that Huff was on probation for selling drugs in Harrison County, however, she admitted that she was not concerned whether that employee had a criminal record. (Tr. p. 171). Also, Appellant knew her stepson, Cordell Priester, had a criminal drug record. (Tr. p. 173). Despite these personal contacts, the ease with which investigators obtained drugs on the premises and from the employees and the extent of the activity, Appellant continues to deny any knowledge of drug activity conducted in the bar. (Tr. p. 178).

{¶22} It is clear by the record that drug sales taking place or originating in the bar were pervasive. Moreover, the record establishes that two current employees, one former employee and Appellant's stepson were selling drugs from the bar. Thus, the record reflects that Appellant knew or should have known of this activity. Given the extensive felony drug activity, the relationship to Appellant of some of the offenders and the relationship to Appellant of those operating the bar in her absence, we must conclude that the evidence supports the conclusion that Appellant acquiesced to the conduct constituting the nuisance. Appellant's denial of any knowledge of the drug activity does not persuade us to reach a different conclusion. Appellant's credibility and the weight to be given to her

testimony are issues for the trier of fact. *Kalain v. Smith, supra,* 162. Further, a review of the record reveals that if she did not have direct knowledge of the specific drug activity, it was because she or the managers acting for her turned a "blind eye" to the activity.

{¶23} With respect to whether Appellant took prompt action to abate the nuisance, Appellant argues in her brief that her husband told Nathan Huff not to return to the bar once his drug activity became apparent. (Appellant's Brief p. 13, citing Tr. p. 264). However, this assertion is contrary to the record. The transcript page to which Appellant cites contains no support for Appellant's proposition. Rather, the record reflects that Huff's employment was terminated for unsatisfactory job performance. (Tr. p. 248).

{¶24} Appellant testified that she placed signs in the bar reading, "no drug sales." (Tr. p. 177). This action can hardly be construed as abating the nuisance. Regardless, there is no evidence to support that the signs were posted in response to the nuisance activity. Placement of the signs prior to the nuisance action may actually be construed as indicating Appellant's knowledge that drug activity was present, or at least potentially present, in the bar. Interestingly, the postings as described express prohibition on drug use.

{¶25} Appellant's husband testified that he did not permit

certain individuals in the bar for various reasons, including drug activity. (Tr. pp. 254, 259-264). There is no indication on the record as to when he allegedly enforced these prohibitions. The record reflects that Appellant took no action against the individuals whose behaviors constituted the nuisance activity in this case. Thus, the record supports finding that Appellant did not take prompt action to abate the nuisance.

{¶26} In this assignment, Appellant also argues that the trial court judgment imposing the statutory tax, ordering closure of the bar and ordering forfeiture of personal property was against the manifest weight of the evidence. *Youngstown v. McDonough, supra*, 6. As we have already stated, judgments supported by some competent, credible evidence going to all the material elements of the case must not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co., supra,* syllabus of the court. Moreover, evidence must be construed consistently with the lower court's judgment. *Gerijo, Inc. v. Fairfield, supra,* 226.

{¶27} As the party seeking injunctive relief, it was the State's burden to prove its allegations by clear and convincing evidence. *Youngstown v. McDonough, supra*, 5, citing *State, ex rel. Freeman, v. Pierce* (1991), 61 Ohio App.3d 663, 669-670. As stated earlier, clear and convincing evidence is that degree of

proof which is more than a mere preponderance of the evidence, but does not rise to the level required in a criminal case, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford, supra,* paragraph three of the syllabus.

{¶28} This portion of her assignment of error does not concern the trial court's finding that Appellant maintained a nuisance. Rather, Appellant challenges only the trial court's order closing the property from any use for one year pursuant to R.C. §3767.06(A). We stated in *McDonough, supra*, that:

> {¶29} "* * * if, despite a finding of guilt, the court determines that the owner acted in good faith, was innocent of any acquiescence to or participation in the conduct establishing the nuisance, and took prompt action to abate the nuisance, no closure order shall be issued under R.C. 3767.06(A) and no tax shall be imposed pursuant to R.C. 3767.09." Id., citing *State ex rel. Pizza v. Rezcallah, supra,* 132.

{¶30} As stated earlier, however, the trial court did not err when it found that Appellant knew or should have known of the illegal activity and thus, acquiesced in it. Likewise, the record reflects that the court correctly ruled she took no actions to abate. Thus, we find no merit in Appellant's second assignment.

{¶31} Appellant's third assignment of error alleges:

> {¶32} "THE COURT HEARD HEARSAY TESTIMONY, THAT HAD NO EXCEPTION OVER OBJECTION OF DEFENSE COUNSEL THAT INFLUENCED THE COURT'S DECISION."

{¶33} Under this assignment, Appellant first challenges the trial court's failure to overrule her objection to Agent Adkins's testimony that two individuals were Appellant's employees. (Tr. pp. 17, 18). Appellant also notes that the trial court overruled her objection to Adkins's testimony regarding a drug buy by another agent which Adkins did not personally observe. (Tr. pp. 28-30). Finally, Appellant argues that the trial court erred in overruling what is actually a challenge to a discovery violation. Appellant argues that the trial court permitted the prosecutor to introduce oral statements of Appellant's employees without her counsel having the benefit of their discovery. Appellant argues in the alternative that the statements are hearsay. Again, based on the record we must hold that this assignment of error lacks merit.

{¶34} Appellant first challenges Agent Adkins's statements that Deborah Sizemore, an employee of the bar, told Adkins that she was an assistant manager and that Nathan Huff was the manager of the bar. (Tr. pp. 17-18). This testimony is not hearsay, as Evid.R. 801(D)(2)(d) provides that, "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship * * *." Further, we noted earlier that the

testimony as to Huff's management of the bar was confirmed by Appellant. (Tr. p. 153).

{¶35} Appellant next challenges the admission of Adkins's statement at trial that, "[t]here was a patron in the [bar] that came back and engaged in conversation with myself and my partner and he said he was sorry he wasn't making a lot of sense but he had just smoked some really good weed and my partner said, 'You didn't save me any' and he said, 'No, but I can get you some from the DJ' and they * * *." (Tr. p. 28). At that point, Appellant's counsel objected to the statements made by the patron as he was not an agent of the bar or a defendant in the nuisance action. (Tr. pp. 28-29). The trial court permitted the statements for the reason that they were not offered for the truth of the matter asserted but to demonstrate how a drug deal was set-up and as they are admissible as statements against penal interest even though this matter did not involve a prosecution of the patron. (Tr. pp. 29-30).

{¶36} Under Evid.R. 801(C), "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statements challenged by Appellant were not offered to prove the truth of the matters asserted. There is no indication on the record that Appellee sought to prove that the

nameless patron had really smoked marijuana or that the alleged drug was actually obtained from the disc jockey. They appear to have been offered examples of how the investigators went about setting up their drug buys.

{¶37} Finally, Appellant's allegation of a discovery violation has been waived. At trial, Appellant challenged the fairness of permitting hearsay evidence without the opportunity to review an existing report which contains a record of those statements. (Tr. pp. 78-81). However, following a recess, it was learned that the prosecutor had not come into possession of those reports until the morning of trial and that the same had been turned over to Appellant's counsel pursuant to a request made the previous day. (Tr. p. 82). The trial court offered to grant a continuance to offset any prejudice, however, Appellant's counsel did not accept such a proposition. (Tr. pp. 82-88). Thus, any claimed error was waived by Appellant.

{¶38} Accordingly, the third assignment of error also lacks merit. Based on the above, this Court must affirm the judgment of the trial court in full.

Vukovich, P.J., dissents in part; see dissenting in part opinion.
Donofrio, J., concurs.

VUKOVICH, P.J., dissenting in part:

{¶39} While I concur with my colleagues with regard to their disposition of appellant's first and third assignments of error, I must respectfully differ from their conclusion that the second assignment of error is also without merit. In that claimed error, it is averred that the trial court embraced the wrong legal standard in deciding to close appellant's business for one year pursuant to R.C. 3767.06(A). Curiously, the majority agrees with the premise but affirms the judgment anyway on the grounds that the error by the trial court was nothing more than a "citation error" wherein that court merely gave the wrong reason to reach a correct judgment.

{¶40} However, I consider the error of the trial court to be much more egregious. This was much more than a mistake as to a point of law. Rather, it was a mistake as to the entire legal standard to be applied against the facts of this case. By its embrace of *Bennis v. Michigan* ((1996), 516 U.S. 442, instead of the holding in *State ex rel. Pizza v. Rezcallah* (1998), 84 Ohio St.3d 116, the trial court eliminated the requirements necessary to comply with the due process clauses of the Constitution of the United States and the Constitution of the State of Ohio, *i.e.*, that the owner of a property has: (1) negligently or knowingly (2) acquiesced to or participated in (3) the creation or perpetuation (4) of a nuisance. See *State ex rel. Pizza*, *supra*, syllabus 1 & 2.

{¶41} Undaunted, my colleagues merely substitute the standard the trial court should have used, then substitutes its appellate review function for that of a finder of fact and makes the determination they think the trial court would have made if it had used the correct legal standard. While such a procedure greatly advances the concept of judicial economy, it does so at the

expense of the proper role of an appellate court.

{¶42} Accordingly, I would remand the matter back to the trial court for that court to apply the correct standard of law to the facts before it by finding merit in the second assignment of error.