[Cite as *State v. Mitchell*, 2010-Ohio-520.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93076

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

EDWARD MITCHELL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509840

BEFORE: Celebrezze, J., Dyke, P.J., and Sweeney, J.

RELEASED: February 18, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Edward Mitchell, appeals from a conviction for drug possession. Appellant argues that the state did not meet its burden in proving that he possessed between one and five grams of crack cocaine. After a thorough review of the record, and for the following reasons, we affirm appellant's conviction.

{¶ 2} On March 28, 2008, East Cleveland police officers Kenneth Pactek and Paul Moore responded to a report of a single vehicle accident near the intersection of East 133rd Street and Third Street in East Cleveland, Ohio. Officer Pactek testified that, upon arrival, he saw a vehicle that had crashed into a telephone pole. The officers observed a man seated at a table across the street. Officer Pactek testified that the man began to walk away when the officers exited their zone car. Wanting to question the man to see if he had observed the accident, the officers asked the man to stop and began walking toward him. The man, later identified as appellant, began to run. Officer Pactek testified that they gave chase on foot and found appellant laying on the ground after a short pursuit. Officer Pactek testified that, when asked why he ran, appellant said he ran because he had a crack rock on him. Officers searched appellant and found a baggie containing several rocks of crack cocaine and almost $1,100 in cash.

{¶ 3} Appellant was arrested and, on April 24, 2008, indicted for drug possession in violation of R.C. 2925.11(A) and drug trafficking in violation of R.C. 2925.03(A)(2), both fourth degree felonies, and possession of criminal tools in violation of R.C. 2923.24(A), a fifth degree felony. All three counts contained forfeiture specifications for the money recovered. Trial began on February 17, 2009. Forensic scientist Jennifer Acurio, an employee of the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that she conducted tests on the substance recovered from appellant by the police. She testified that, based on a random sampling of the substance using three different tests, the substance consisted of 1.8 grams of crack cocaine.

{¶ 4} The trial concluded with verdicts of guilty on Count 1, drug possession, and not guilty on Counts 2 and 3, drug trafficking and possession of criminal tools, respectively. The jury also determined that appellant should not forfeit the seized money, finding him not guilty of the forfeiture specifications. Appellant was sentenced to 18 months incarceration. Appellant cites two assignments of error for our review.

Sufficiency of the Evidence

{¶ 5} In appellant's first assignment of error, he argues that the state did not meet its burden of establishing each and every element of drug possession.

{¶ 6} The Ohio Supreme Court has recognized that "[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he 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. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The Court, explaining further, stated: "In *Jenks*, we emphasized that '[w]here reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder. Rather, upon appellate review, the evidence must be viewed in the light most favorable to the prosecution.'" Id., quoting *Jenks* at 279.

{¶ 7} Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent, credible evidence that goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

{¶ 8} Appellant argues that, because forensic scientist Jennifer Acurio conducted a chemical analysis of the seized substance using all samples from

a single piece of crack cocaine, the state failed to prove that he possessed the requisite amount of cocaine for the crime charged.[1]

{¶ 9} Ms. Acurio testified that she received the evidence obtained in the search of appellant. She explained that upon opening the sealed envelope containing the substance, she observed around ten rocks of a crystalline substance. She weighed the substance and determined that it constituted 1.8 grams. She then selected a random chunk, a representative sample of the substance,[2] and performed three tests to determine if the substance was cocaine. First, she did a color test. This resulted in a positive test for the presence of cocaine. Next, she did a crystalline test, which resulted in a positive test for cocaine. Finally, she did an instrument test, which also confirmed the presence of cocaine. This final test is sophisticated enough to

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[1] R.C. 2925.11 states:

"(A) No person shall knowingly obtain, possess, or use a controlled substance.

"* * *

"(C) Whoever violates division (A) of this section is guilty of one of the following:

"* * *

"(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

"* * *

"(b) If the amount of the drug involved equals or exceeds * * * one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense."

[2] Ms. Acurio was unable to remember if all three samples were from the same rock or from different rocks, but testified that her standard procedure was to take a random chunk and take three samples from the same chunk.

determine the type of cocaine present. The results indicated that it was cocaine base, commonly referred to as crack cocaine.

{¶ 10} Det. William Mitchell, the processing detective on the case, testified that he also field tested a sample from the quantity seized from appellant, which tested positive for cocaine, before shipping it off to BCI for analysis.

{¶ 11} Appellant argues that testing one rock is insufficient to prove that all the seized substance was crack, and therefore the state failed to show that he possessed more than one gram of crack cocaine. The case law in Ohio holds otherwise.

{¶ 12} This court, in *In re Lemons* (1991), 77 Ohio App.3d 691, 603 N.E.2d 315, held that a random sample "was substantial evidence from which the trial court could properly conclude beyond a reasonable doubt that all thirty-one rocks contained cocaine." Id. at 696. In *State v. Rose*, 144 Ohio App.3d 58, 2001-Ohio-3297, 759 N.E.2d 460, a substantially similar case to the one at bar, the Seventh District determined that "the testing of random samples of the rocks constituting State's Exhibits 1 and 2 was substantial evidence from which the jury could have concluded beyond a reasonable doubt that all the rocks were crack cocaine." Id. at 66. The Tenth District has held that the "random sampling method of testing creates a reasonable inference that all similar contraband contains the same controlled substance

as that tested, at least when the contraband is recovered together and similarly packaged." *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, 787 N.E.2d 691, ¶81. Here, the substance was similar in appearance and packaged together in one bag.

{¶ 13} While it may have been appropriately cautious for the forensic scientist to follow the federal guideline of testing the square root of the total amount present, in this case three to four rocks, it was unnecessary here. Evidence apart from the forensic scientist's conclusions exists in the record to further establish that the substance found on appellant was crack cocaine. A sample field tested by Det. Mitchell also tested positive for cocaine. While not conclusive, it is further circumstantial evidence that the entire 1.8 grams was crack cocaine.

{¶ 14} The most damaging evidence to appellant's argument is his own statement. On March 31, 2008, in a statement typed by Det. Mitchell, appellant admitted that he possessed seven to eight rocks of crack cocaine when arrested. Appellant's initials appear next to this statement, and his signature appears at the bottom of the document.

{¶ 15} Appellant cites to cases from foreign jurisdictions holding that the testing of numerous samples is required.[3] That is not the law in Ohio. See *Samatar* at ¶81.

{¶ 16} Sufficient evidence existed in the record to conclude that appellant possessed more than one gram but less than five grams of crack cocaine. Appellant's first assignment of is overruled.

Manifest Weight of the Evidence

{¶ 17} Appellant also argues that his conviction is against the manifest weight of the evidence.

{¶ 18} The Ohio Supreme Court, in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. * * * See *Tibbs v. Florida* (1982), 457 U.S. 31, 38, 42 * * * [.]" *Martin* at 175. Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are

[3] *State v. Robinson* (Mn. 1994), 517 N.W.2d 336; *People v. Jones* (Ill. 1996), 174 Ill.2d 427, 675 N.E.2d 99, 221 Ill.Dec. 192.

issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Martin*, supra.

{¶ 19} A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

{¶ 20} Appellant argues that there was insufficient evidence to demonstrate that he possessed an adequate quantity of crack cocaine for the charged crime. This actually goes to an attack of the credibility of the conclusion of an expert witness, namely that the substance appellant possessed was crack cocaine. See *Rose*, supra, at 66. "It is well settled in Ohio that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the fact. Thus, we will not second-guess such determinations unless it is clear that the jury lost its way and a miscarriage of justice occurred." (Internal citations omitted.) Id. Sufficient evidence that appellant possessed 1.8 grams of crack cocaine exists in the record as demonstrated above. Therefore, the jury did not clearly lose its way in determining that appellant was guilty of fourth-degree felony drug

possession. No miscarriage of justice has occurred, and appellant's second assignment of error is overruled.

Conclusion

{¶ 21} The state met its burden of demonstrating that appellant possessed an amount of crack cocaine greater than one gram but less than five grams. The testimony of two witnesses and appellant's own statement all lead a reasonable trier of fact to the conclusion that appellant possessed crack cocaine in an amount sufficient to sustain the conviction.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., and
JAMES J. SWEENEY, J., CONCUR