[Cite as *State v. Diggs*, 2018-Ohio-3729.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ANDRE DIGGS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 16 BE 0036

Motion to Certify a Conflict

BEFORE:
Kathleen Bartlett, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
DENIED

Atty. J. Flanagan, Courthouse Annex 1, 147-A West Main Street, St. Clairsville, Ohio 43950 for Plaintiff-Appellee and

Atty. Peter Galyardt, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: September 4, 2018

PER CURIAM.

{¶1} On June 25, 2018, we released our Opinion in *State v. Diggs*, 7th Dist. No. 16 BE 0036, 2018-Ohio-2761. Appellant Andre Diggs has filed a motion to certify a conflict to the Ohio Supreme Court. He asks us to certify the following question: Is some form of tangible, competent, credible evidence in addition to police officer testimony required to prove a school-vicinity enhancement beyond a reasonable doubt. Because judgments cited by Appellant from the Fourth, Fifth, Sixth, Ninth and Tenth District Courts of Appeals are not in conflict with the decision of this Court, the motion to certify a conflict to the Ohio Supreme Court is denied.

{¶2} App.R. 25(A) reads, in pertinent part:

> A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order of the court that creates a conflict with a judgment or order of another court of appeals and made note on the docket of the mailing, as required by App. R. 30(A). * * * A motion under this rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

{¶3} Article IV, Section 3(B)(4) Article IV, Section 3(B)(4) reads:

> Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

{¶4} Hence, the following conditions must be met before and during certification pursuant to Section 3(B)(4), Article IV of the Ohio Constitution:

> First, the certifying court must find that its judgment is in conflict with the

> judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. (Emphasis deleted.)

State v. Agee, 7th Dist. No. 14 MA 0094, 2017-Ohio-7750, ¶ 4, quoting *Whitelock v. Gilbane Bldg. Co*., 66 Ohio St.3d 594, 613 N.E.2d 1032, (1993), paragraph one of the syllabus. In addition, the issue proposed for certification must be dispositive of the case. *Agee* at ¶ 4, citing *State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012–Ohio–759, 963 N.E.2d 811, ¶ 2.

{¶5} Appellant contends that our decision in the above-captioned case is in conflict with *State v. Throckmorton*, 4th Dist. No. 08CA17, 2009-Ohio-5344, rev'd in part on other grounds, 126 Ohio St.3d 55, 2010-Ohio-2693, *State v. Goins*, 5th Dist. No. CA99-08 (Sept. 29, 2000), *State v. Olvera*, 6th Dist. No. WM-98-022, WM-98-023, 1999 WL 819346, *State v. Brown*, 9th Dist. No. 23637, 2008-Ohio-2670, and *State v. Montgomery*, 10th Dist. No. 13AP-512, 2014-Ohio-4354. However, the decisions of the Fourth, Fifth, Sixth, Ninth and Tenth Districts turn on the specific facts presented in each case, rather than any conflict in the applicable law.

{¶6} All of the cases cited by Appellant find their genesis in *State v. Manley*, 71 Ohio St.3d 342, 643 N.E.2d 1107 (1994). Manley was convicted of trafficking in drugs within one thousand feet of the boundaries of a school premises.

{¶7} At trial, two police officers and a confidential informant testified that the drug transaction occurred in the vicinity of "Whittier School" or simply a "school." One of the police officers testified that he measured the distance from the edge of the school property to the edge of the property where the drug transaction occurred, and he stated that the distance was 255.3 feet. The confidential informant testified that the drug transaction transpired about four houses from the school. Manley did not question any of the witnesses' testimony regarding the distance from the school to the location of the drug transaction.

{¶8} The Ohio Supreme Court rejected Manley's argument that the evidence

was insufficient to prove that the offense occurred within one thousand feet of the school. The *Manley* Court predicated its decision on the testimony of the two police officers and the confidential informant, as well as Manley's failure to challenge their testimony at trial. It is important to note that no tangible, competent, credible evidence in addition to the testimonial evidence was required to prove the school-vicinity enhancement in *Manley*.

{¶9} Turning to the cases cited by Appellant in the motion to certify, both the Fifth District in *Goins* and the Sixth District in *Olvera* sustained sufficiency-of-the-evidence challenges to school-vicinity enhancements. However, a thorough examination of each case reveals that they are factually distinguishable from the case sub judice.

{¶10} In *Goins*, the distance between the crime scene and the school was measured with a laser speed control because a ravine separated Goins' residence and the school. The Ohio State Patrolman, who was certified in the use of the laser and measured the distance, did not testify at trial.

{¶11} Instead, testimony was offered by the county sheriff who was present when the distance was measured. He conceded that the distance between Goins' residence and the spot from which the trooper made his calculations was not measured. A sketch of the area and the measurements were introduced, but the county sheriff admitted that the drawing was not to scale, and that neither the ravine nor the property line of the school were illustrated.

{¶12} In *Olvera*, the state relied upon the testimony of one police officer. Based upon a depiction of Olvera's residence with a circle extending 1000 feet in all directions, the police officer testified that the school was 709 feet from Olvera's front door. The diagram was not made a part of the trial court record. The police officer offered no explanation of the method he used to ascertain the distance between the crime scene and the school, or any testimony that the diagram upon which he relied was drawn to scale. *Id.* at *8.

{¶13} The facts in both cases are easily distinguishable. In *Goins*, the county sheriff conceded that no measurement was taken from Goins' property to the spot from which the calculation to the school was made. Because the testimonial evidence did

not establish the distance between Goins' home and the school, the Fifth District turned to the documentary evidence, which was equally unreliable. The holding in *Olvera* is likewise inapposite. The police officer in that case based his testimony on a diagram not admitted into evidence. He did not testify as to any other method of measurement. As in *Goins,* the testimonial evidence in *Olvera* was insufficient to invoke the school-vicinity enhancement. As a consequence, the Sixth District looked to the documentary evidence, which was neither described at trial nor made a part of the record on appeal.

{¶14} In other words, neither the Fifth nor Sixth District held that tangible, competent, credible evidence in addition to police officer testimony is required to sustain the school-vicinity enhancement. Those Districts considered the documentary evidence offered at trial because the testimonial evidence was insufficient as a matter of law (Goins), or the method of measurement could not be determined from the record (Olvera).

{¶15} The same is not true here. The police officer testified that St. Mary's Catholic School was "just a few hundred feet north of McDonald's" and essentially connected to the back of the school by an alley. He also described his method of measurement, a tool on the computer used to measure distances that "gives a diameter of a thousand feet." (Trial Tr., 240). There was no need for additional evidence because the uncontroverted testimony supports the school-vicinity enhancement.

{¶16} Unlike the *Goins* and *Olvera* courts, the courts of appeals in the remaining three cases cited by Appellant overruled the sufficiency challenges. Appellant nonetheless contends that the holdings in these cases conflict with our holding in the above-captioned case. To the contrary, in each case, the testimonial evidence offered at trial was in the form of an estimate, and, as a consequence, the appellate court looked beyond the testimony to additional documentary evidence in the record to sustain the school-vicinity enhancement.

{¶17} In *Brown*, the appellant premised his evidentiary challenge on the state's failure to offer evidence of an actual measurement of the distance between Brown's residence and the school. In the absence of an actual measurement, the Ninth District relied upon testimony that the house was across the street from the school, reasoning that it would be "extremely uncommon to encounter a city street the width of which even

approaches one fifth of a mile," as well as photographs and a satellite image that included the house and school.

{¶18} In *Throckmorton*, the appellant argued that the state was required to present "exact" evidence, rather than the estimations offered at trial, to establish the distance between the school and the crime scene. The Fourth District, in what it characterized as a "straight application of *Manley*," held that the testimony of several prosecution witnesses established that the offenses occurred close to a school, and that testimony, combined with photographic evidence, was sufficient to sustain the school-vicinity enhancement on appeal.

{¶19} In *Montgomery*, the state relied upon the testimony of a police detective who estimated that the crime scene was "approximately 250, 300 yards" from two schools. He further testified that he utilized the county auditor's website, which calculates a 1,000 foot radius from any parcel in the county. Montgomery cited a federal decision, *United States v. McCall*, 553 F.3d 821 (5th Cir. 2008), for the proposition that a "guess" by a narcotics agent is insufficient to apply the school-vicinity enhancement.

{¶20} In *McCall*, the government offered an aerial photograph without scale and the testimony of a police detective that he had driven the streets shown in the photograph a number of times and that the school and house were, in his opinion, within 1000 feet of each other. With respect to the aerial photograph, the court noted that "[t]he jurors were * * * left with nothing but an aerial photograph without any indication of scale whatsoever." *Id.* at 832–33. The court further noted that, without a "circle or some indication of scale and distance on it, the aerial photograph is useless." *Id.* at 833. In order to distinguish the facts in *Montgomery*, the Tenth District relied upon a scaled aerial satellite photograph of the apartment and the two schools in the vicinity.

{¶21} Although Appellant has cited case law from other districts where the intermediate appellate court considered tangible, competent, credible evidence in addition to police officer testimony, he has not cited a case where that evidence was required to sustain a school-vicinity enhancement. The Districts relying on evidence in addition to testimony from a police officer have done so where the testimony offered at trial was in the form of an estimation, rather than the result of actual measurement by an

articulated method. As a consequence, the cases are factually distinguishable from our case.

{¶22} In summary, neither *Manley*, supra, nor its progeny have required some form of tangible, competent, credible evidence in addition to credible police officer testimony to prove a school-vicinity enhancement beyond a reasonable doubt. Where the testimony of the police officer is inexact or the method of measurement cannot be discerned, Ohio appellate courts have looked to documentary evidence in the record. Because the police officer in this case provided credible testimony regarding the distance between the McDonalds in Martins Ferry and St. Mary's Catholic School, and his method for ascertaining that distance, we find that the rule of law announced in this case is not in conflict with the pronouncements of the Fourth, Fifth, Sixth, Ninth, and Tenth District Courts of Appeals. Accordingly, the motion to certify question to the Ohio Supreme Court is denied.

Bartlett, J., concurs.

Waite, J., concurs.

Robb, P. J., concurs.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.