[Cite as *State v. Truitt*, 2011-Ohio-1885.]

# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

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| STATE OF OHIO, | : | APPEAL NO. C-050188<br>TRIAL NO. B-0403782(C) |
| Plaintiff-Appellee, | : | |
| vs. | : | *DECISION ON RECONSIDERATION.* |
| TAMBOURA TRUITT, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed and Appellant Discharged in Part, and Cause Remanded

Date of Judgment Entry on Appeal: April 20, 2011

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Paula E. Adams*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Roger W. Kirk*, for Defendant-Appellant.

Per Curiam.

**{¶1}** Defendant-appellant Tamboura Truitt appeals from his convictions upon jury verdicts finding him guilty of possessing marijuana, trafficking in marijuana, and conspiracy. He presents on appeal five assignments of error. We affirm his possession and trafficking convictions, but discharge him on the conspiracy charge. And we remand the case to the trial court for the proper imposition of postrelease control.

### *On Reconsideration*

**{¶2}** Truitt was convicted in 2005. On appeal, we vacated his conspiracy conviction, but affirmed his possession and trafficking convictions. And he unsuccessfully appealed those convictions to the Ohio Supreme Court.[1]

**{¶3}** In November 2010, citing the Ohio Supreme Court's decisions in *State v. Jordan*[2] and its progeny, Truitt applied under App.R. 26(A) for reconsideration of our 2006 decision in his case. The *Jordan* line of cases had made apparent our error in failing to recognize that Truitt had not been sentenced in conformity with the statutory mandates concerning postrelease control.[3] And those decisions provided the extraordinary circumstances that warranted enlarging the time for filing an application for reconsideration.[4] For those reasons, we granted reconsideration. And we here reconsider, and substitute this decision for, our 2006 decision.

### *The Facts*

**{¶4}** Truitt was charged with possession, trafficking, and conspiracy in connection with a drug transaction in April 2004. The transaction had been set up by a confidential informant assisting the Hamilton County Regional Narcotics Unit

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[1] See *State v. Truitt* (Dec. 27, 2006), 1st Dist. No. C-050188, appeal not accepted for review, 110 Ohio St.3d 1467, 2006-Ohio-4288, 852 N.E.2d 1215.
[2] 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.
[3] See App.R. 26(A); *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171.
[4] See App.R. 14(B).

("RENU") in exchange for "case consideration." The informant initiated contact with Truitt by leaving a note at his house. Truitt telephoned the informant the following day and told him that he could get 50 pounds of marijuana from Charles Crenshaw. The transaction was then arranged through a series of subsequent telephone conversations that RENU agents recorded.

**{¶5}** On the day of the sale, the informant went to Truitt's house wearing a recording device. Charles Crenshaw and his brother Jonathan Crenshaw arrived with 50 pounds of marijuana. Truitt, the informant, and the Crenshaws counted out the bags of marijuana in Truitt's kitchen, loaded the marijuana into Truitt's van, and proceeded to a restaurant to meet the informant's "money man." Jonathan Crenshaw and the informant traveled in the informant's car, and Truitt and Charles Crenshaw traveled in Truitt's van.

**{¶6}** Police stopped both vehicles a short distance from the house. They found Truitt's eight-year-old son sitting on the bags of marijuana in the back of the van. They arrested Truitt without incident, and they apprehended Charles Crenshaw, who had attempted to flee, a short time later. Jonathan Crenshaw, who had also attempted to flee, was shot and killed after he had pointed a gun at a RENU agent.

### *The Assignments of Error*

**{¶7}** ***Admission of evidence.*** In his first assignment of error, Truitt alleges that the trial court erred in admitting at trial irrelevant and prejudicial evidence and in overruling his motion for a mistrial based upon the admission of the evidence. Specifically, Truitt challenges the admission of evidence that police had killed Jonathan Crenshaw, that Truitt had engaged in illegally copying and selling pornographic videos, and that police, during a search of Truitt's residence, had discovered in a closet an unloaded semiautomatic assault rifle. These challenges are untenable.

**{¶8}** A trial court's admission of relevant evidence will not be reversed on appeal unless the court abused its discretion.[5] Truitt asserts that the trial court abused its discretion in admitting evidence about Jonathan Crenshaw's death because "it had nothing to do with Mr. Truitt." We disagree. Truitt and Jonathan Crenshaw were involved in the drug deal. And the death of Jonathan Crenshaw had been a part of the crimes for which Truitt was being tried.

**{¶9}** Truitt also argues that the trial court abused its discretion in admitting into evidence the rifle found in the search of Truitt's house. At trial, Truitt emphasized in his defense that no scales, drugs, or drug paraphernalia had been found at his residence. A police officer countered with testimony that the rifle was the type of weapon that drug dealers commonly possessed. We, therefore, find no abuse of discretion in the admission of the rifle.

**{¶10}** Finally, Truitt argues that the trial court abused its discretion in allowing the prosecution to inform the jury that he had been in the business of copying and selling copyrighted pornographic videos. But part of Truitt's defense was that he had been in another room copying his videos while the drug deal had taken place in his kitchen. And the record shows that the admission of the evidence concerning pornographic videos did not contribute in any meaningful way to Truitt's convictions.[6]

**{¶11}** We, therefore, overrule the first assignment of error.

**{¶12}** ***Prosecutorial misconduct.*** In his second assignment of error, Truitt alleges that he was denied due process of law by the assistant prosecuting attorney's misconduct. This challenge is equally untenable.

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[5] See *State v. Maurer* (1984), 15 Ohio St.3d 239, 264-265, 473 N.E.2d 768.
[6] See id. at 266.

**{¶13}** Prosecutorial misconduct will not provide a ground for reversing a conviction unless it deprived the defendant of a fair trial.[7] We hold that the alleged instances of prosecutorial misconduct in this case were insufficient to deprive Truitt of a fair trial, particularly in light of the strength of the evidence against him. We, therefore, overrule the second assignment of error.

**{¶14}** ***Ineffective assistance of trial counsel.*** In his third assignment of error, Truitt alleges that he was denied the effective assistance of counsel. But Truitt has failed to demonstrate a reasonable probability that, but for counsel's alleged unprofessional errors, the results of the trial would have been different.[8] We, therefore, overrule the third assignment of error.

**{¶15}** ***Weight and sufficiency of the evidence.*** In his fourth assignment of error, Truitt asserts that his convictions were based upon insufficient evidence and were against the manifest weight of the evidence. Upon a careful review of the record, we hold that the evidence, viewed in the light most favorable to the prosecution, could have convinced a rational trier of fact that all the elements of the offenses had been proved beyond a reasonable doubt.[9] Further, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding Truitt guilty.[10] Accordingly, we overrule the fourth assignment of error.

**{¶16}** ***Conspiracy conviction.*** In his fifth assignment of error, Truitt contends that the trial court erred in convicting him of conspiracy. We agree.

**{¶17}** Truitt was convicted of possessing and trafficking in marijuana and of conspiracy to commit those offenses. R.C. 2923.01(G) provides, "When a person is convicted of committing or attempting to commit a specific offense or of complicity

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[7] See *State v. Keenan* (1993), 66 Ohio St.3d 402, 623 N.E.2d 203; *State v. Hirsh* (1998), 129 Ohio App.3d 294, 717 N.E.2d 789.
[8] See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Lytle* (1978), 48 Ohio St.2d 391, 358 N.E.2d 623.
[9] See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.
[10] See id.; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

in the commission of or attempt to commit the specific offense, the person shall not be convicted of conspiracy involving the same offense."

**{¶18}** Truitt argues, and the state agrees, that the trial court violated R.C. 2923.01(G) when it convicted Truitt of conspiracy involving the possession and trafficking offenses of which he was convicted. Therefore, we sustain the fifth assignment of error.

### *Postrelease Control*

**{¶19}** Truitt was found guilty of trafficking in marijuana, a first-degree felony, and possession of marijuana, a second-degree felony. Therefore, R.C. 2967.28(B) required the sentencing court to "include" in the judgment of conviction "a requirement that [Truitt] be subject to [the prescribed] period of postrelease control."[11] But the court failed to specify in the judgment of conviction the duration of Truitt's postrelease-control supervision. To that extent, his sentences are void,[12] and he is "entitled * * * to the proper imposition of postrelease control."[13]

**{¶20}** In this appeal, Truitt has not assigned as error the trial court's failure in this regard. But when a sentence is void to the extent that it was not imposed in conformity with the statutory mandates concerning postrelease control, and the matter has come to the attention of a court, either on direct appeal or in a collateral challenge, the court "cannot ignore" the matter,[14] and "the offending portion of the sentence is subject to review and correction."[15]

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[11] See *Jordan*, 104 Ohio St.3d 21, paragraph one of the syllabus.
[12] See *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶69; *State v. Gorassi*, 1st Dist. No. C-090292, 2010-Ohio-2875, ¶13.
[13] *State v. Fischer*, ___Ohio St.3d __, 2010-Ohio-6238, 942 N.E.2d 332, paragraph two of the syllabus ("modify[ing]" *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, syllabus, by holding that "[t]he new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control").
[14] *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, ¶12; accord *State v. Holcomb*, 184 Ohio App.3d 577, 2009-Ohio-3187, 921 N.E.2d 1077, ¶17-20; *State v. Long*, 1st Dist. No. C-100285, 2010-Ohio-6115, ¶5.
[15] *Fischer*, ___Ohio St.3d __, paragraph one of the syllabus and ¶27.

### *Conclusion*

**{¶21}** Truitt's conspiracy conviction violated R.C. 2923.01(G). Accordingly, we reverse the conviction and order that he be discharged from further prosecution for that offense.

**{¶22}** His sentences are void to the extent that the judgment of conviction did not conform to the requirements of R.C. 2967.28(B). We, therefore, remand this case only for correction of the offending portion of the sentences in accordance with the law and this decision.

**{¶23}** In all other respects, we affirm the judgment of the court below.

Judgment accordingly.

**HILDEBRANDT, P.J., SUNDERMANN** and **FISCHER, JJ.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.