[Cite as *State v. Tipton*, 2010-Ohio-628.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-743
v.	:	(C.P.C. No. 08CR04-2334)
Michael E. Tipton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 23, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Jeffrey A. Berndt, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Michael E. Tipton ("appellant"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas. For the following reasons, we affirm.

{¶2} On February 16, 2007, Whitehall police officers executed a search warrant at an address on North Roosevelt Avenue in Bexley. The search revealed ten marijuana plants and paraphernalia used to grow marijuana. The total weight of the marijuana plants was between 200 and 1000 grams.

{¶3} The Franklin County Grand Jury indicted appellant on two counts: one count of cultivation of marijuana in violation of R.C. 2925.04 and one count of possession of marijuana in violation of R.C. 2925.11. Both of the charges were fifth-degree felonies based on the weight of the plants.

{¶4} Appellant expressed an intention to assert the affirmative defense set forth in R.C. 2925.04(F), which establishes an affirmative defense to a charge of cultivation of marijuana where the circumstances indicate that the marijuana was possessed or cultivated solely for personal use. The trial court scheduled a hearing, at the beginning of which the state dismissed the charge of cultivation of marijuana, leaving only the possession charge. At the hearing, appellant's counsel stated that the dismissal of the cultivation charge was a tactical decision made by the state in order to prevent appellant from raising the personal use defense. Counsel further argued that the personal use defense set forth for the cultivation charge should also be applied to the possession charge, since R.C. 2925.04(F) refers to both cultivation and possession of marijuana.

{¶5} In response, the state pointed out that R.C. 2925.04(F) by its terms applies only to charges under that section. In this case, the statutory basis for the possession charge against appellant was R.C. 2925.11. The state pointed out that R.C. 2925.11(F) sets forth a personal use affirmative defense for charges of possession of other drugs under that section, but specifically omits marijuana from the list of drugs for which personal use is a defense to a charge of possession. The state did not dispute appellant's counsel's assertion that dismissal of the cultivation charge was a tactical decision made to prevent appellant from arguing the personal use defense.

{¶6} The trial court concluded that appellant would not be allowed to assert the personal use defense to the possession charge. Appellant then entered a plea of no contest to the possession charge. The court accepted the plea and found appellant guilty of the possession charge, and sentenced appellant to two years of community control.

{¶7} Appellant filed this appeal, alleging a single assignment of error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT RULED THAT THE PERSONAL USE DEFENSE SET FORTH IN OHIO REVISED CODE SECTION 2925.04(F), ILLEGAL CULTIVATION OF MARIJUANA, DID NOT APPLY TO A CHARGE OF POSSESSION OF MARIJUANA UNDER OHIO REVISED CODE SECTION 2925.11 WHERE THE MARIJUANA POSSESSED WAS IDENTICAL TO THE MARIJUANA WHICH WAS CULTIVATED BY THE DEFENDANT.

{¶8} R.C. 2925.04, which sets forth the offense of cultivation of marijuana, provides, in relevant part:

> (A) No person shall knowingly cultivate [marijuana] or knowingly manufacture or otherwise engage in any part of the production of a controlled substance.
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> * * *
>
> (C)(5) If the drug involved in the violation is [marijuana], the penalty for the offense shall be determined as follows:
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> * * *
>
> (c) If the amount of [marijuana] involved equals or exceeds two hundred grams but is less than one thousand grams, illegal cultivation of [marijuana] is a felony of the fifth degree.
>
> * * *
>
> (F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for a fifth degree felony violation of illegal cultivation of [marijuana] that the [marijuana] that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or

> mixed with substances that are not controlled substances in a manner, or is possessed or cultivated under any other circumstances that indicate that the [marijuana] was solely for personal use.

{¶9} R.C. 2925.11, which sets forth the offense of possession of controlled substances, also includes the affirmative defense that "the controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use." R.C. 2925.11(F). However, by its terms, this personal use affirmative defense is only available for charges that are fourth degree felony offenses under R.C. 2925.11. Where the controlled substance possessed is marijuana, none of the penalties for possession is a fourth-degree felony. R.C. 2925.11(C)(3)(a) through (f). Therefore, the personal use affirmative defense to a charge of possession under R.C. 2925.11 was not available to appellant.

{¶10} Appellant argues that he should have been permitted to present the personal use defense set forth in R.C. 2925.04(F), notwithstanding the dismissal of the count in the indictment charging him with a violation of that section of the Revised Code, because, in this case, the marijuana that formed the basis for the charge of cultivation also formed the basis for the possession charge. Appellant points to the language contained in R.C. 2925.04(F) that makes the personal use defense available when the marijuana is "possessed or cultivated" under circumstances indicating that the marijuana was solely for personal use. Appellant argues that this language shows the General Assembly's intention that the personal use affirmative defense would apply to both possession and cultivation charges.

{¶11} It is axiomatic that " '[t]he first rule of statutory interpretation is to give effect to the plain meaning of the words employed in the statute.' " *Manheim Automotive Financial Servs., Inc. v. E.M. Sales, Inc.*, 10th Dist. No. 04AP-701, 2005-Ohio-4248, ¶12, quoting *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342, 1992-Ohio-1. R.C. 2925.04(F) specifically states that the personal use affirmative defense applies only to charges under that section, and therefore applies only to a charge of cultivation of marijuana.

{¶12} Appellant argues that the use of the word "possessed" in describing the personal use affirmative defense means that R.C. 2925.04 actually sets forth two separate offenses: one for cultivation of marijuana, and one for possession of the marijuana that has been cultivated. However, the offense of cultivation of marijuana is set forth in R.C. 2925.04(A), and nothing in that paragraph refers to possession of marijuana as an offense separate from that of cultivating marijuana under R.C. 2925.04. The only provision setting forth possession of marijuana as an offense is R.C. 2925.11, and that section excludes the charge against appellant, possession of marijuana as a fourth-degree felony, from operation of the personal use affirmative defense.

{¶13} Appellant argues that this construction allows the state to avoid operation of the personal use affirmative defense by either declining to charge an offender with cultivation of marijuana or, as it did here, dismissing the cultivation charge and proceeding forward on the charge of possession with respect to the same marijuana. Appellant further argues that the most logical explanation for the omission of the personal use affirmative defense from possession of marijuana under R.C. 2925.11 is that the

General Assembly recognized that personal use had already been made an affirmative defense to a marijuana-related charge under R.C. 2925.04.

{¶14} However, this court's duty is to give effect to the actual words used by the General Assembly, not to speculate as to the motivation behind the General Assembly's omission of words from a statute. The plain language of R.C. 2925.04 only sets forth the offense of cultivating marijuana, not a separate offense of possession of the marijuana that has been cultivated, and the plain language of R.C. 2925.11 excludes possession of marijuana from operation of the personal use defense contained in that statute. Although this may appear to create an unusual result under the circumstances of this case, where appellant was indicted for both cultivating and possessing the same marijuana, we cannot avoid the plain language of the statute. Any remedy to this result must necessarily come from the General Assembly by way of an amendment to R.C. 2925.11 making that section's personal use affirmative defense applicable to charges of possessing marijuana.

{¶15} Therefore, appellant's assignment of error is overruled. Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

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