

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-12-043
	:	
- vs -	:	<u>OPINION</u>
	:	8/17/2009
	:	
NRAG, LLC d.b.a. DUNKINS EXPRESS	:	
MARKET,	:	
	:	
Defendant-Appellant.	:	
	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08CRI00050

David B. Bender, Fayette County Prosecuting Attorney, 1st Floor Courthouse, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

C. Jay Schwart, 1029 Dublin Road, Columbus, Ohio 43215, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, NRAG, LLC d.b.a. Dunkins Express Mart, appeals its conviction for illegal use of food stamps in violation of R.C. 2913.46(C)(1).

{¶2} Dunkins is an incorporated convenience store in Washington Court House, Fayette County, Ohio. Dunkins' sole owner and CEO is Darsit Patel. Darsit's father-in-law, Harmanbhai Patel, works for Dunkins as a store clerk. Darsit and Harmanbhai live at the same residence in Washington Court House.

{¶13} In 2007, the Ohio Department of Public Safety's investigative unit received a complaint that Dunkins was allowing customers to purchase alcohol using food stamp Electronic Benefits Transfer (EBT) cards.¹ As a result, undercover agents were sent to Dunkins on a number of occasions in an attempt to see if such purchases could be made at the store. On January 15, January 26 and January 31, 2008, Harmanbhai allowed undercover agents posing as customers to purchase beer using food stamp EBT cards.

{¶14} In March 2008, Dunkins was indicted on three counts of illegal use of food stamps in violation of R.C. 2913.46(C)(1), a felony of the fifth degree. Following a jury trial, Dunkins was convicted as charged and fined \$2,500.

{¶15} Dunkins appeals, assigning the following as error:

{¶16} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, THEREBY DENYING DEFENDANT ITS DUE PROCESS RIGHTS BY DENYING DEFENDANT'S CRIM.R. 29 MOTION FOR ACQUITTAL."

{¶17} Dunkins argues the trial court erred in denying its Crim.R. 29(A) motion for acquittal because the state failed to present sufficient evidence to prove beyond a reasonable doubt that Darsit *knowingly* allowed Harmanbhai to permit customers to purchase beer using food stamp EBT cards. We agree.

{¶18} Crim.R. 29(A) requires a trial court, on motion of a defendant or sua sponte, following the close of evidence on either side, to order the entry of a judgment of acquittal on the offense charged in the indictment if the evidence is insufficient to sustain a conviction for the offense. In reviewing the denial of a Crim.R. 29(A) motion for acquittal, an appellate court must view the evidence in a light most favorable to the

1. In Ohio, a food stamp EBT card, commonly known as the "Direction Card," is a plastic card that works like a debit card and replaces food stamp coupons.

state, and determine whether reasonable minds can reach different conclusions as to whether each material element of the offense charged has been proved beyond a reasonable doubt. *State v. Fox*, Fayette App. No. CA2008-03-009, 2009-Ohio-556, ¶23.

{¶9} R.C. 2901.23(A)(4) provides that an organization may be convicted of an offense "[i]f, acting with the kind of culpability otherwise required for the commission of the offense, its commission was authorized, requested, commanded, tolerated, or performed by the board of directors, trustees, partners, or by a high managerial officer, agent, or employee acting in behalf of the organization and within the scope of his office or employment." The Ohio Supreme Court has interpreted the phrase, "high managerial officer, agent, or employee," as meaning, "high managerial officer, high managerial agent, or high managerial employee," or "high managerial personnel." *State v. CECOS Internatl., Inc.* (1988), 38 Ohio St.3d 120, 123-124. High managerial personnel are those who make basic corporate policies. *Id.* at 124.

{¶10} R.C. 2913.46(C)(1) prohibits an organization from "[k]nowingly allow[ing] an employee to sell, transfer, or trade items or services, the purchase of which is prohibited by the 'Food Stamp Act of 1977,' *** as amended, *** in exchange for food stamp coupons [or] any electronically transferred benefit[.]" (Emphasis added.) Thus, in order to hold Dunkins criminally liable for the illegal use of food stamps in violation of R.C. 2913.46(C)(1), the state was required to show that Dunkins' high managerial personnel *knowingly* allowed a Dunkins' employee to sell an item, the purchase of which is prohibited by the food stamp act, in exchange for food stamps.

{¶11} At trial, Dunkins moved for acquittal on the ground that the state failed to present sufficient evidence to prove beyond a reasonable doubt that Darsit *knowingly* allowed Harmanbhai to permit customers to purchase beer using a food stamp EBT

card.² The trial court overruled Dunkins' motion on the basis of state's exhibit 11, which is Dunkins' application to participate in the food stamp program that was signed by Darsit on Dunkins' behalf. The application states in relevant part:

{¶12} "I accept responsibility on behalf of the firm for violations of the Food Stamp Program regulations, including those committed by any of the firm's employees, both paid and unpaid, new, full-time or part-time. These include violations, such as but not limited to:

{¶13} "***

{¶14} "— Accepting food stamp benefits as payment for ineligible items."

{¶15} The trial court found that the application constituted Dunkins' acceptance of responsibility for insuring its employees would follow the rules of the food stamp program, and therefore concluded that the state had presented sufficient facts to allow the jury to find that Darsit *knowingly* allowed Harmanbhai to permit customers to purchase beer with food stamp EBT cards. We disagree with the trial court's determination.

{¶16} R.C. 2901.22(B) defines the culpable mental state of "knowledge," as follows:

{¶17} "A person acts knowingly *** when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶18} ""Knowledge" is cast in [R.C. 2901.22] in terms of an awareness of the probability that one's conduct will cause a certain result or be of a certain nature, or that certain circumstances exist. ***

2. Beer is an item that cannot be purchased with food stamps under the Food Stamp Act of 1977, as amended. See Section 2012(k), Title 7, U.S. Code.

{¶19} *****

{¶20} "Basing the definition of knowledge on probability and the definition of recklessness on likelihood [see R.C. 2901.22(C)] is intentional. Something is "probable" when there is more reason for expectation or belief than not, whereas something is "likely" when there is merely good reason for expectation or belief." (Emphasis deleted.) *State v. Gould* (1994), 95 Ohio App.3d 634, 636, quoting the 1974 Committee Comment to R.C. 2901.22.

{¶21} While Darsit's signing the food stamp application may render Dunkins liable for any *civil* or *administrative* penalties that may be assessed against it as a result of Harmanbhai's conduct, it clearly does not prove, for purposes of obtaining a *criminal conviction* against Dunkins under Ohio R.C. 2913.46(C)(1), that Darsit *knowingly* allowed Harmanbhai's conduct. By finding otherwise, the trial court essentially deleted the "knowingly" element from the offense of illegal use of food stamps set forth in R.C. 2913.46(C)(1) and converted that crime into a strict liability offense. The trial court erred in doing so.

{¶22} A defendant's knowledge may be inferred from the totality of the surrounding circumstances. *State v. Jeffers*, Lake App. No. 2007-L-011, 2008-Ohio-1894, ¶19. However, a review of the totality of the circumstances in this case shows that even when all the evidence is examined in a light most favorable to it, the state failed to present sufficient evidence to permit a reasonable juror to infer that the state proved beyond a reasonable doubt the "knowledge" or "knowingly" element of R.C. 2913.46(C)(1).

{¶23} For example, the evidence produced at trial fails to clearly establish that Darsit was present when any of the illegal sales occurred, and on at least one occasion, he refused to allow an undercover agent to purchase beer using a food stamp EBT card.

Moreover, even though one of the undercover agents testified that Darsit apologized for the actions of his father-in-law at the time the agents issued administrative citations against Dunkins for the illegal sales that had taken place, the jury could not have reasonably inferred knowledge on Darsit's part from this apology, since the agent acknowledged during cross-examination that Darsit made the apology only after he denied knowing the illegal sales had been taking place.

{¶24} The state argues "a clear reading" of R.C. 2901.23(A)(4) "indicates that *any* employee's conduct may be imputed to the corporation" for purposes of holding the corporation criminally liable. (Emphasis added.) In support, it cites federal cases like *Standard Oil Co. of Texas v. United States* (C.A.5, 1962), 307 F.2d 120, 127, which holds that "a corporation may be criminally bound by the acts of subordinate, even menial employees."

{¶25} However, the Ohio Supreme Court rejected this argument in *CECOS Internatl., Inc.*, 38 Ohio St.3d 120. While conceding that the argument that a corporation may be criminally bound by the acts of *any* of its employees "may be maintained from a public policy standpoint[,]" the court held that "a reasonable and appropriate construction" of R.C. 2901.23(A)(4) "indicates a business entity may be found guilty of a criminal offense *only* if the criminal act or omission was approved, recommended, or implemented by high managerial personnel with actual or implied authority to approve, recommend or implement same." (Emphasis added.) *Id.* at 124.

{¶26} In light of the foregoing, even when the evidence presented is viewed in a light most favorable to it, the state failed to present sufficient evidence to prove beyond a reasonable doubt that Dunkins' high managerial personnel *knowingly* allowed a Dunkins' employee to permit customers to purchase beer using a food stamp EBT card. Therefore, the trial court erred by overruling Dunkins' Crim.R. 29(A) motion for acquittal.

{¶27} Accordingly, Dunkins' sole assignment of error is sustained.

{¶28} The trial court's judgment is reversed, Dunkins' conviction and sentence are vacated, and Dunkins is discharged from the offense for which it was indicted.

{¶29} Judgment reversed and appellant is discharged.

POWELL, P.J., and YOUNG, J., concur.