[Cite as *State v. Shafei*, 2015-Ohio-645.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2013-11-196
Plaintiff-Appellee,	:	CA2014-03-072
		CA2014-05-102
	:	
- vs -		O P I N I O N
	:	2/23/2015
SAAD AL SHAFEI, et al.,	:	
Defendants-Appellants.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2013-05-0711

Michael T. Gmoser, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Repper, Pagan, Cook, Ltd., Christopher J. Pagan, 1501 West First Avenue, Middletown, Ohio 45044, for defendants-appellants

HENDRICKSON, J.

{¶ 1} Defendants-appellants, Saad Shafei, Mohammad Nasser Abuhammoudeh, and Osama Demaidi aka Sami Sosa, appeal their convictions in the Butler County Court of Common Pleas. For the reasons detailed below, we affirm.

{¶ 2} This is an appeal involving the possession and distribution of XLR11, a synthetic cannabinoid, which, beginning on December 20, 2012 was classified by the Ohio General Assembly as a Schedule I controlled substance. On May 15, 2013, appellants were

indicted for various offenses involving the possession and distribution of XLR11, which occurred multiple times through April 4, 2013. Following their indictments, appellants each filed separate motions to dismiss, alleging due process violations. Appellants also challenged the validity of certain actions taken by the Ohio General Assembly under Ohio's Controlled Substances Act (Ohio's CSA) in the classification of XLR11 as a Schedule I controlled substance pursuant to R.C. 3719.41. The trial courts denied appellants' respective motions to dismiss.

{¶ 3} Subsequently, appellants pled guilty to various offenses involving the possession and distribution of XLR11. Each conviction was based on conduct occurring on March 26, 2013 and April 4, 2013, nearly four months after the Ohio General Assembly classified XLR11 as a Schedule I controlled substance.[1] Specifically, Shafei and Abuhammoudeh each pled guilty to one count of aggravated possession of drugs in violation of R.C. 2925.11, a second-degree felony with a forfeiture specification. Sosa pled guilty to two counts of aggravated trafficking in drugs in violation of R.C. 2925.03(A)(1), both fourth-degree felonies, and one count of aggravated possession of drugs in violation of R.C. 2925.11. Sosa also pled guilty to a forfeiture specification.

{¶ 4} Appellants have each appealed their convictions, raising the same due process and constitutional challenges. This court has consolidated these three cases on appeal, as they involve identical issues and raise the same two assignments of error. For ease of discussion, we will address appellants' assignments of error out of order.

{¶ 5} Assignment of Error No. 2:

{¶ 6} THE POSSESSION AND TRAFFICKING XLR11 FAILED TO STATE AN OFFENSE ON OR BEFORE 4 APRIL 2013.

1. Sosa was convicted of one count of aggravated trafficking of drugs for conduct occurring on March 26, 2013. The remaining convictions by all appellants were based on conduct that occurred on April 4, 2013.

{¶ 7} In their second assignment of error, appellants contend XLR11 was not a Schedule I controlled substance on the date of their indictments. Appellants make two arguments based on their interpretation of the various provisions in Ohio's CSA. First, appellants claim their convictions are in error because the federal government did not include XLR11 on its list of Schedule I controlled substances before April 4, 2013, the date giving rise to appellants' convictions. Second, appellants claim that XLR11 was "specifically excepted" under federal drug abuse control laws.

Ohio's CSA

{¶ 8} Appellants' first issue involves a challenge to whether XLR11 was a Schedule I controlled substance at the time of the relevant conduct. A "[c]ontrolled substance means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V." R.C. 3719.01(C).

{¶ 9} The schedule of controlled substances is defined in R.C. 3719.41. Under R.C. 3719.41, controlled substances are subject to amendment pursuant to R.C. 3719.43 or 3719.44. R.C. 3719.43 states that when the United States Attorney General determines that a controlled substance should be scheduled, the controlled substance is automatically placed on the corresponding Ohio schedule. *State v. Klinck*, 44 Ohio St.3d 108, 109 (1989). In addition, R.C. 3719.44 provides that the state board of pharmacy "may" review and amend Ohio controlled substance schedules at any time and also details guidelines for the board's consideration when it determines whether a compound should be added to or transferred from a particular schedule. *State v. Ingram*, 64 Ohio App. 3d 30, 31 (1st Dist.1989).

{¶ 10} In the present case, it is undisputed that effective December 20, 2012, the Ohio General Assembly amended R.C. 3719.41 to classify XLR11 as a Schedule I controlled substance through the passage of Am.Sub.H.B. No. 334. The federal government did not

subsequently add XLR11 to the federal list of Schedule I controlled substances until May 16, 2013, which occurred after appellants' indictments. *See* 78 Fed.Reg. 28735-01. In turn, appellants claim that XLR11 was not a "controlled substance" at the time of their indictments based on the federal schedule and, therefore, their convictions for XLR11 offenses must be reversed. We disagree.

{¶ 11} Although appellants are correct that R.C. 3719.43 and R.C. 3719.44 provide means for altering and updating the controlled substance schedules set forth in R.C. 3719.41, neither provision prevents the General Assembly from altering the controlled substance schedules itself. Pursuant to its police powers, "the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment." *State v. Ahlers*, 12th Dist. Butler No. CA2013-07-134, 2014-Ohio-3991, ¶ 17, citing *State v. Thompkins*, 75 Ohio St.3d 558, 560 (1996). Thus, in the present case, the General Assembly adopted Am.Sub.H.B. No. 334, which became effective on December 20, 2012. As a result of this legislation, XLR11 was added to the list of Schedule I controlled substances prior to the date of appellants' offenses. *See* R.C. 3719.41(C)(41). Accordingly, to the extent that appellants claim that XLR11 was not a Schedule I controlled substance, their assignment of error is without merit and overruled.

"Specifically Excepted"

{¶ 12} Appellants separately argue XLR11 was "specifically excepted" under the law. As previously noted, R.C. 3719.41 contains the schedule of controlled substances, which includes XLR11 as a "Schedule I hallucinogen." The pertinent provisions of R.C. 3719.41(C), regarding hallucinogens, provide:

> Any material, compound, mixture, or preparation that contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, *unless specifically excepted under federal drug abuse control laws*, whenever the

> existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation.
>
> * * *
>
> (41)[1-(5-fluoropentylindol-3-yl)]-(2,2,3,3-tetramethylcyclopropyl)methanone (5-fluoropentyl-UR-144; XLR11);

(Emphasis added.)

{¶ 13} Based on this language, appellants argue XLR11 was "specifically excepted under federal drug abuse laws" because XLR11 was not included in the federal list of Schedule I controlled substances until after the commission of their offenses. In support of this claim, appellants rely on a decision from the Utah Supreme Court, *State v. Mooney*, 98 P.3d 420, 2004 UT 49, to argue that XLR11 was "specifically excepted" based on conflicting state and federal classifications of controlled substances. We disagree and find *Mooney* inapposite to the facts here.

{¶ 14} In *Mooney*, the defendants were convicted for a number of offenses related to the possession and distribution of peyote. *Id*. at 422. While peyote was among the controlled substances listed as a Schedule I controlled substance in the Utah Code, the preamble to that provision provided an exception for substances that were "specifically excepted" or "listed in another schedule." *Id*. 424. In reversing appellants' convictions, the court in *Mooney* noted that the language of Utah's Controlled Substances Act failed to specify the source of the applicable exceptions or address whether the "specific exceptions" could be found in "state statutes, state regulations, federal statutes, federal regulations, or some combination of these sources." *Id*. at 425.

{¶ 15} Furthermore, the court in *Mooney* also referenced a clear conflict in the federal and state schedules, as peyote was listed as a controlled substance under one of the state schedules, but was listed as exempt under the federal schedules that had been incorporated

by reference into the Utah CSA. *Id*. Therefore, because of the various omissions and inconsistencies, the court in *Mooney* found the term "specific exception" to be ambiguous and, therefore, considered other principles of statutory construction, which ultimately resulted in the reversal of the defendants' convictions. *Id*. at 429.

{¶ 16} Unlike the factual scenario presented in *Mooney*, the Ohio CSA clearly references specific exceptions "under federal drug abuse control laws." In addition, there is no exception for XLR11 contained in any state or federal schedule that would render Ohio's CSA inconsistent or ambiguous. The fact that XLR11 was not listed as a Schedule I controlled substance under the pertinent federal provisions does not mean that XLR11 was "specifically excepted" under the statute. In essence, appellants confuse the term "specific exception" with that of an omission, a term defined as "something that is left out, left undone, or otherwise neglected." Black's Law Dictionary (9th Ed.2009). Therefore, we find that XLR11 was properly considered a controlled substance prior to the commission of appellants' crimes. Accordingly, appellants' second assignment of error is without merit and overruled.

{¶ 17} Assignment of Error No. 1:

{¶ 18} THE DUE PROCESS CLAUSE PROHIBITED THE PROSECUTION OF XLR11-RELATED OFFENSES.

{¶ 19} In their first assignment of error, appellants allege two due process defenses. First, appellants claim they are entitled to an "entrapment by estoppel" defense. Next, appellants claim that due process prohibited their prosecution for the XLR11 offenses. We find no merit to appellants' arguments.

Entrapment by Estoppel

{¶ 20} Appellants first argue their convictions in the present case are barred by application of the defense of "reasonable reliance" or "entrapment by estoppel." In so doing,

appellants rely on a 2001 Ohio Attorney General's opinion, which appellants claim "obviates[s] [their] convictions and even their prosecutions in the first instance, as a violation of [d]ue [p]rocess." 2001 Ohio Atty.Gen.Ops. No. 2001-014.

{¶ 21} There are very few decisions in Ohio that have directly implicated the defense of entrapment by estoppel. As a result, we are guided by the Fourth District Court of Appeals decision in *State v. Howell*, 4th Dist. Jackson No. 97CA824, 1998 WL 807800 (Nov. 17, 1998), as well as the numerous federal cases that have implicated this defense.[2]

{¶ 22} "Entrapment by estoppel, grounded in the Due Process Clause of the Fifth Amendment, is a defense that is rarely available. In essence, it applies when, acting with actual or apparent authority, a government official affirmatively assures the defendant that certain conduct is legal and the defendant reasonably believes that official." *Howell* at *11, citing *United States v. Howell*, 37 F.3d 1197, 1204 (7th Cir.1994). Although there are various definitions for the entrapment by estoppel defense:

> [t]he common thread in the caselaw applying the defense is an affirmative misrepresentation of the law by a government official, reasonable reliance, and action upon that misrepresentation by a defendant. When the defense is applicable, it prevents the government from punishing one who reasonably followed the misstatement of one of [the government's] own officials. To allow such punishment would be to sanction the most indefensible sort of entrapment by the State-convicting a citizen for exercising a privilege which the State clearly had told him was available to him.

Id. As a result, the "entrapment by estoppel" defense is only available in instances where (1) a government official announced that the charged criminal act was legal, (2) the defendant relied on that statement, (3) the defendant's reliance was reasonable, and (4) given the defendant's reliance, prosecution would be unfair. *United States v. Levin*, 973 F.2d 463, 468

2. We note that this court has previously used the term "entrapment by estoppel" in *State v. Johnson*, 12th Dist. Clinton No. CA97-07-006, 1998 WL 1701 (Jan. 5, 1998). However, *Johnson* does not involve a discussion of the doctrine, as this court overruled the assignment of error on other grounds.

(6th Cir.1992).

{¶ 23} In *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959), three defendants had been convicted for failing to answer questions put to them at an inquiry before the Un-American Activities Commission of the Ohio Legislature. *Id.* at 424. Before the defendants testified, they were informed of their privilege against self-incrimination under the Ohio Constitution, but they were not further informed that an Ohio immunity statute deprived them of the right to invoke the privilege against self-incrimination. *Id.* at 425. The United States Supreme Court reversed the convictions, stating that the prosecutions "sanction an indefensible sort of entrapment by the State-convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.* at 426. This, the Court concluded, violated due process. *Id.* at 437.

{¶ 24} The United States Supreme Court reached a similar conclusion in *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965). In that case, a police chief had affirmatively granted a group of demonstrators permission to protest across the street from a courthouse. *Id.* at 571. A demonstrator was later convicted of violating a statute that prohibited protesting "near" the courthouse. *Id.* at 560. The Supreme Court reversed, holding that a demonstrator, having been supplied with the police chief's "on-the-spot administrative interpretation" of the statute, "would justifiabl[y] tend to rely on this administrative interpretation of how 'near' the courthouse a particular demonstration might take place." *Id.* at 568-69. In explaining its ruling, the Court observed that the appellant had been effectively advised that a protest in that location "would not be one 'near' the courthouse within the terms of the statute." *Id.* at 571. As in *Raley*, the "[a]ppellant was led to believe that his [conduct] violated no statute." *Id.* at 572.

{¶ 25} Likewise, in *Levin*, 973 F.2d 463, a Medicare provider had been expressly told

by government officials that a certain procedure and practice would not violate billing regulations. *Id.* at 464-465. The government's subsequent prosecution for billing fraud was dismissed on the basis of entrapment by estoppel. *Id.* at 468.

{¶ 26} In the present case, appellants have failed to establish the entrapment by estoppel defense, as they fail to demonstrate any of its requirements. First, appellants' reliance on 2001 Ohio Atty.Gen.Ops. No. 2001-014 is misplaced because that opinion addressed a specific concern regarding a conflict in the listing of a different controlled substance, gammahydroxybutyrate (GHB). 2001 Ohio Atty.Gen.Ops. No. 2001-014. The opinion made no reference to the legality of XLR11 or to the particular issues involved in the present action.

{¶ 27} Rather, in that opinion, the Ohio Attorney General was asked to clarify the enactment of Am.H.B. 428, which amended the controlled substances schedules to designate GHB as a Schedule II controlled substance on December 9, 1999, which became effective on May 17, 2000. *Id.* at *1. However, between the time that Am.H.B. 428 was adopted and its effective date, the United States Attorney General adopted a final rule designating GHB as a Schedule I controlled substance and placed any FDA-approved drug containing GHB in Schedule III. *Id.* By operation of R.C. 3719.43, the action by the federal government automatically modified Ohio's controlled substance schedules. *Id.* at *2. Thus, when Am.H.B. 428 became effective on May 17, 2000, GHB had already been listed in Schedule I and Schedule III. *Id.* Pursuant to the express language in R.C. 3719.41, Am.H.B. 428 became inoperative because, at the time of the effective date of the statute, GHB was "listed in another schedule." *Id.* at *2-*3. As a result, the Ohio Attorney General's opinion concluded "for purposes of Ohio law gammahydroxybutyrate (GHB) is a Schedule I controlled substance and FDA-approved drugs containing GHB are Schedule III controlled substances,

notwithstanding the provisions of Am. H.B. 428." *Id.* at *3.

{¶ 28} It is clear that the Ohio Attorney General's opinion in 2001 Ohio Atty.Gen.Ops. No. 2001-014 was limited to that specific situation where the General Assembly had acted to classify a substance and there is a subsequent modification of the federal schedule relating to the same substance, which, in turn, renders the provisions ambiguous. Specifically, the opinion noted:

> This result is appropriate in light of other provisions of Ohio law and in light of its overall effect. Pursuant to R.C. 3719.43, federal action scheduling controlled substances is automatically effected in the state schedules, "subject to amendment pursuant to [R.C. 3719.44]," which is action by the State Board of Pharmacy. R.C. 3719.43 and R.C. 3719.44 do not address the situation in which the General Assembly acts directly to amend the controlled substance schedules appearing in R.C. 3719.41. However, it is clear in the instant case that, because the federal classification of GHB was not yet in effect when the General Assembly enacted Am. H.B. 428, the General Assembly did not adopt in Ohio a classification different from one in effect under federal law. In enacting Am. H.B. 428, the General Assembly intended to include GHB as a controlled substance, but it cannot have intended to modify the GHB classifications prescribed by federal law, for those classifications were not yet in effect. Therefore, it is appropriate that the federal classifications prevail under Ohio law, in accordance with the provisions of R.C. 3719.43.

(Citations omitted.) *Id.*

{¶ 29} Here, unlike the situation involved the Ohio Attorney General's opinion, XLR11 was listed as a Schedule I controlled substance under R.C. 3719.41, but not included on the federal schedule. Although the federal government did subsequently add XLR11 to its list of Schedule I controlled substances, that addition did not render any provision in the revised code ambiguous. In addition, the Ohio Attorney General's opinion specifically noted "R.C. 3719.43 and R.C. 3719.44 do not address the situation in which the General Assembly acts directly to amend the controlled substance schedules appearing in R.C. 3719.41" and did not

express any opinion as to the Ohio General Assembly's authority to classify a controlled substance not in the federal schedule. *Id.*

{¶ 30} Based on our review of the Ohio Attorney General's opinion, there is simply no affirmative representation that the possession or distribution of XLR11 would enable appellants to make a good faith reliance or entrapment by estoppel argument with respect to their convictions for the possession or distribution of XLR11. The specific issue in that opinion addressed the classification of GHB, not XLR11, and involved a situation wholly separate from the issue presented in this case. Here, the situation is simply one in which the General Assembly acted to classify XLR11 as a Schedule I controlled substance prior to the enactment of any federal laws or regulations. Accordingly, appellants have failed to show that the Ohio Attorney General's opinion could be considered an official government announcement that could be reasonably relied upon in any activity concerning the possession or distribution of XLR11.

{¶ 31} Moreover, even if we were persuaded that 2001 Ohio Atty.Gen.Ops. No. 2001-014 could be considered an affirmative official announcement on the criminality of XLR11, we would still find that appellants failed to establish the defense of entrapment by estoppel. *See United States v. Ray*, 411 F.3d 900, 903 (8th Cir.2005) (holding that the defendant had to "show that the government assured him that certain conduct was legal"); *United States v. Parker*, 267 F.3d 839, 844 (8th Cir.2001) (holding that the defendant could not rely on an entrapment by estoppel defense because he could "point to no evidence illustrating that he reasonably relied upon a law enforcement official's assertion that [his conduct] was legal or that any such assertion was made to him"); *United States v. Dodson*, 519 Fed.Appx. 344, 351 (6th Cir.2013) (finding the defense of entrapment by estoppel was not available where there was no evidence the defendant was aware of a report). Appellants have not provided

any evidence that they reasonably relied on 2001 Ohio Atty.Gen.Ops. No. 2001-014, or were even aware of the existence of that opinion prior to their offenses. Accordingly, appellants failed to establish that they are entitled to the "entrapment by estoppel" defense.

Due Process

{¶ 32} Appellants separately argue their due process rights were violated because "the General Assembly failed to afford fair notice that XLR11's possession and trafficking was criminalized." In so doing, appellants claim portions of the Ohio Revised Code pertinent to their drug charges are unclear and contradictory. Appellants rely on a United States Supreme Court decision in *United States v. Cardiff*, 344 U.S. 174, 73 S.Ct. 189 (1952), for the proposition that their due process rights were violated by their prosecution for the possession and distribution of XLR11.

{¶ 33} In *Cardiff*, the defendant challenged provisions of the Food, Drug, and Cosmetic Act pertaining to the inspection of factories. *Id.* at 174. The act criminalized a factory owner's refusal to permit an inspector access to the factory, as defined by a second federal statute. *Id.* However, the second federal statute authorized the entry or inspection of the relevant facility "'after first making request and obtaining permission of the owner, operator, or custodian' of the plant or factory 'to enter' and 'to inspect' the establishment, equipment, materials and the like 'at reasonable times.'" *Id.* at 174-175. The defendant in *Cardiff* was convicted of the relevant crimes after he refused inspection of the facility. *Id.* at 175. However, on appeal, the Supreme Court reversed because the statute failed to give fair notice of the criminality of the conduct because of the conflicting commands and vagueness in the statute. *Id.* As such, the Court held that the statute failed to give the defendant fair warning that his refusal was unlawful because, by referring to the second statute in the act, it appeared to give the individual the right to withhold his permission. *Id.*

{¶ 34} Based on our review, we find appellants' convictions do not violate due process or implicate *Cardiff*. Unlike *Cardiff*, nothing in the pertinent drug possession and distribution statutes fails to provide appellants with fair warning of the illegality of their conduct. *See, e.g., State v. Hause*, 12th Dist. Warren No. CA2008-05-063, 2009-Ohio-548, ¶ 34 (a statute may be void based on due process principles if the statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" or if "it encourages arbitrary and erratic arrests and convictions"). The General Assembly classified XLR11 as a Schedule I controlled substance through its enactment of Am.Sub.H.B. No. 334. That provision provides that XLR11 is a Schedule I controlled substance effective December 20, 2012. *See* R.C. 3719.41(C)(41). There is nothing vague or otherwise confusing about the criminalization of XLR11, as its inclusion is clearly enumerated in R.C. 3719.41 and persons of ordinary intelligence would not have to guess whether the statute applies to his or her conduct. *See State v. Whalen*, 1st Dist. Hamilton No. C-120449, 2013-Ohio-1861, ¶ 10-13.

{¶ 35} As this court has previously noted, it is well-established that ignorance of the law is no excuse. *State v. Fille*, 12th Dist. Clermont No. CA2001-08-066, 2002-Ohio-3879, ¶ 35; *State v. Merkle*, 1st Dist. Hamilton Nos. C-020454 and C-030557, 2004-Ohio-1913, ¶ 78. Therefore, we conclude appellants' convictions did not violate due process, as the statutes do not impose unclear or contradictory standards, nor did the General Assembly fail to provide fair notice in the criminalization of XLR11. Accordingly, appellant's first assignment of error is without merit and overruled.

{¶ 36} Judgment affirmed.

M. POWELL, P.J., and RINGLAND, J., concur.