[Cite as *State v. Mangan*, 2009-Ohio-6137.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23263
v.	:	T.C. NO. 2007 CR 4578/2
JULIE MANGAN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 20th day of November, 2009.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Julie A. Mangan, filed February 20, 2009. On November 9, 2007, Mangan was indicted on one count of possession of marijuana, in an amount which equaled or exceeded 200 grams but was less

than 1,000 grams; one count of aggravated possession of drugs (psilocyn), a drug included in Schedule I or II, in an amount which equaled or exceeded five times the bulk amount but was less than 50 times that amount; one count of possession of hashish, in solid form, in an amount which equaled or exceeded 10 grams but was less than 50 grams; and one count of possession of L.S.D. Mangan filed a motion to suppress, which the trial court overruled on September 2008.

{¶ 2} Following a jury trial, Mangan was found guilty of possession of marijuana, a felony of the fifth degree, guilty of aggravated possession of drugs (psilocyn), a felony of the second degree, and guilty of possession of hashish, a felony of the fifth degree, in violation of R.C. 2925.11(A). The trial court sentenced Mangan to 10 months on the marijuana charge, to a mandatory term of five years on the aggravated possession of drugs charge, and to six months on the hashish charge, to be served concurrently for a total term of five years. The trial court also suspended Mangan's driver's license for a period of 12 months on each count.

{¶ 3} The events giving rise to this matter began on November 2, 2007, when U.S. Postal Inspector Greg Ball responded to the Dayton International Airport to assist Dayton Police Narcotics Detective Kevin Bollinger, a canine handler, "with some profiling of some packages at the airport." Bollinger had located four "huge" boxes at the airport that "stood out right away." Bollinger noted that the boxes "were all going to the same location, all shipped out of the same location. * * * They had no phone numbers on shipper or receiver, going to a residence. If somebody's going to pay that exorbitant amount of money going to a residence, you would think you want to make sure that somebody's there or if, for some

reason, they get lost that they'd be able to get ahold of the shipper or the receiver to make sure that those packages can get delivered." The shipping charges for three of the boxes were over $60.00 each, and the cost for the fourth box was over $70.00. The packages were addressed to Steven Marks, at 718 Wagon Wheel Drive, in Riverside. They contained a "signature release," which means "that nobody had to be there to claim the package[s]" when they were delivered. The sender of the packages was "Susan Howard," from Santa Rosa, California, an area well known to be a source of drugs. The boxes were taped on the outside, and according to Bollinger, narcotics traffickers use tape to mask odors within their boxes. Bollinger placed the four boxes throughout the warehouse and then walked his canine, Badger, throughout the area. Badger alerted to the four boxes. When Ball arrived, he also placed the boxes throughout the warehouse, and Badger alerted to the boxes a second time.

{¶ 4} After a search warrant was obtained, the boxes were opened, and they all contained mushrooms. Ball testified that the packages were resealed, and he delivered them to the Wagon Wheel address while Riverside Police officers were staged in the area. Ball knocked on the door, which was answered by Andrew Trick, Mangan's boyfriend. Trick took possession of all of the boxes, without asking any questions about them. He signed for them, using the name Steven Marks. Ball testified, "it smelled like burning marijuana" in the house.

{¶ 5} Once the packages were inside the home, the Riverside officers obtained a search warrant and served it immediately after Ball left the residence. Officer Rhett Close knocked on the door and announced the presence of the police in possession of the search

warrant three times. When no one came to the door, Detective James Vance hit the door with a battering ram, eventually breaking the bottom of the door. Mangan and Trick were in the living room, and they were ordered to the ground and arrested.

{¶ 6} Officers found drugs and drug paraphernalia throughout the house, along with books entitled, "Marijuana Law," and "Mushroom Cultivation." At trial, Trick testified that Mangan was rarely home, and that all of the drugs in the home were his. He testified that Mangan knew nothing about the mushrooms, and that she "didn't have anything to do with" the other drugs that were seized. Mangan's trial testimony was consistent with Trick's.

{¶ 7} At sentencing, Mangan apologized, stating she was "really sorry for everything that happened and the way it happened."

{¶ 8} Mangan asserts two assignments of error. Her first assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING MS. MANGAN'S MOTION TO SUPPRESS."

{¶ 10} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found.

(Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 11} According to Mangan, Badger was not properly certified in compliance with Ohio law, namely the Ohio Administrative Code, Chapter 109:2-7-01 through 06, and therefore, "the dog's finding the boxes in the warehouse could not support the probable cause needed for a search warrant."

{¶ 12} The training and certification of law enforcement canines, their handlers and those who certify them are governed by the Ohio Peace Officer Training Commission. The rules promulgated by the Commission are set forth in the Ohio Administrative Code Chapter indicated above. "Some disagreement exists among courts about what evidence is necessary to show that a dog is reliable and properly trained. Nevertheless, the majority hold that the state can establish reliability by presenting evidence of the dog's training and certification, which can be testimonial or documentary. Once the state establishes reliability, the defendant can attack the dog's 'credibility' by evidence relating to training procedures, certification standards, and real-world reliability." (Citation omitted). *State v. Lopez*, Hamilton App. No. C-050088, 2006-Ohio-2091, ¶ 5. The *Lopez* court disagreed with the defendant's assertion that the state had to present evidence "on every requirement for training and certification of dogs and handlers in the Ohio Administrative Code." Id., ¶ 26.

{¶ 13} Detective Bollinger testified that he is assigned to the drug interdiction unit of the City of Dayton Police Department, and his responsibilities are to

"intercept narcotics coming into the city and narcotic-related contraband, mainly currency, departing the city to purchase narcotics." He has been a canine handler for 18 years, and he has had three drug dogs. Bollinger has "probably up to 2,000 hours" of canine training. Bollinger has also had training in drug documentation, record keeping, detailing methods in which narcotics dealers record their financial transactions, forfeiture and distribution of contraband. Bollinger has provided testimony as a canine handler in "Federal court in Ohio; Brooklyn, New York; Tallahassee, Florida * * * ," and his testimony has "always been accepted."

{¶ 14} Badger was trained at the United States Customs and Border Protection Canine Training Center in Front Royal, Virginia, during the months of March, April and May of 2007. Bollinger was not involved in Badger's initial training, and he testified, "it was a request of mine since I've been through their training twice before. They didn't see an issue of me coming down and getting a dog that had already been certified and had not received a handler yet." Bollinger went to Virginia and "trained with [Badger] one-on-one with an instructor for three weeks." Subsequently, after a three-day certification process, on June 1, 2007, they were certified together as a team, and Badger's certification was valid when she alerted to the boxes herein. Bollinger provided documentary evidence that Badger was certified in Virginia.

{¶ 15} Badger is the only dog with which Bollinger works. According to Bollinger, Badger performs a minimum of four hours of nontask-related training every week and another one to two hours of task-related training. Bollinger testified that Badger is trained on six odors, namely marijuana, hash, cocaine,

heroin, ecstasy and methamphetamine, and she is not trained on mushrooms. Bollinger testified, "Marijuana and mushrooms go hand in hand. And it's my belief that she was picking up an odor of marijuana from those boxes." She has had 44 verified alerts in actual cases, and over 700 successful alerts in training. Annually, Bollinger has to take Badger to Virginia to be re-certified.

{¶ 16} During extensive cross-examination, Bollinger testified that he was unsure whether Badger's certification met with the standards enumerated in the Ohio Administrative Code.

{¶ 17} In overruling Mangan's motion to suppress, the trial court concluded, and we agree, that the documentary and testimonial evidence presented by Bollinger "is sufficient to find that Badger is certified and reliable as a narcotics detection canine. Defendants extensively cross-examined Bollinger, but did not demonstrate that Badger was not 'credible.' Defendants did not dispute that the agency that certified Badger is one of five nationally recognized agencies. Further, defendants did not present any evidence that Badger's training was improper or deficient in any way." The trial court concluded that "Badger and Bollinger are a properly certified team in the detection of narcotics. As a result, probable cause existed for the search warrants related to the four boxes searched * * * and for the residence located at 718 Wagon Wheel Drive * * * ." Finally, the court noted, "Under Ohio law, 'it is well established that a drug dog's sniff does not constitute a search.' *State v. Desman*, [Montgomery App. No. 19730, 2003-Ohio-7248, ¶ 29 (citation omitted).] . Although Badger was not trained specifically to detect mushrooms, Bollinger testified to the association between mushroom[s] and

marijuana and the possibility of cross-contamination. Thus, Badger's alert on the four boxes was not an illegal search."

{¶ 18} We further note, as the State asserts, that the provisions of the Ohio Administrative Code upon which Mangan relies do not apply to Badger's certification in Virginia; the rules only establish the minimum requirements for certification in Ohio, and they do not prohibit the use of canine units if the unit's certification does not satisfy the requirements set forth in the Ohio Administrative Code. Further, the rules do not condition the admissibility of evidence obtained as the result of an alert upon compliance with those rules. As the State correctly asserts, "any noncompliance with the Ohio Adm[inistrative] Code did not affect either the reliability or the admissibility of Badger's alert."

{¶ 19} Finally, as the State asserts, even if Badger's certification was bound by Ohio standards, which it is not, the Ohio Supreme Court has determined that the exclusionary rule applies " * * * to violations of a constitutional nature only. In *State v. Myers* (1971), 26 Ohio St.2d 190, 196 * * * [the Ohio Supreme Court] enunciated the policy that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule. In *State v. Downs* (1977), 51 Ohio St.2d 47, 63-64 * * * the violation of CrimR. 41 with respect to the return of a search warrant was described as non-constitutional in magnitude and the exclusionary rule was not applied. Also, in *State v. Davis* (1978), 56 Ohio St.2d 51, * * * it was held that fingerprint evidence obtained in violation of a statute does not have to be excluded.

{¶ 20} "It is clear from these cases that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights." *Kettering v. Hollen* (1980), 64 Ohio St.2d 232, 234-35.

{¶ 21} Since the trial court's finding that Bollinger and Badger are a certified and reliable canine unit was based upon competent and credible evidence, we must accept it. Accordingly, there is no merit to Mangan's first assignment of error, and it is overruled.

{¶ 22} Mangan's second assignment of error is as follows:

{¶ 23} "THE TRIAL COURT ERRED IN SENTENCING MS. MANGAN TO MORE THAN MINIMUM SENTENCES."

{¶ 24} According to Mangan, the trial court abused its discretion because it sentenced her "based on the bad behavior" of Trick. Mangan directs our attention to the following remark by the court at sentencing:

{¶ 25} "Ma'am, the jury didn't buy your protestations of innocence in not knowing what was going on and neither do I. There was a big pot of psychedelic mushrooms in your kitchen. There was marijuana all over your refrigerator and you acted like you had no idea what was going on. I think that the description of your apartment as a drug den was pretty appropriate. And the fact that your former boyfriend came in and apparently or appeared to have lied on the stand and then left and didn't even show up for his own sentencing makes everything even less credible."

{¶ 26} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4, the

Supreme Court of Ohio determined, "[i]n applying [*State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856] to the existing [sentencing] statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law," the standard found in R.C. 2953.08(G).

{¶ 27} "If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id., ¶4. The *Kalish* Court noted, trial courts still must consider R.C. 2929.11 and 2929.12 in sentencing, "and be mindful of imposing the correct term of postrelease control." Id., ¶13. "R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." Id., ¶ 17.

{¶ 28} First, Mangan's sentence is not contrary to law. The maximum sentence for a felony of the fifth degree is 12 months, and Mangan was sentenced to terms of 10 months and six months on her fifth degree felony offenses. R.C. 2929.14(A)(5). The maximum sentence for a felony of the second degree is eight years, and Mangan was sentenced to five years on that charge. R.C.

2929.14(A)(2).

{¶ 29} Second, we see no abuse of discretion. While Mangan suggests that the sentencing court's remarks indicate that Mangan was punished for Trick's "lies, irresponsibility and disrespect," we believe it is just as likely that the court's comment was directed to the couple's ludicrous attempt to conspire to protect Mangan. As the State asserts, "Mangan herself placed Trick's credibility at issue when she called him as a witness to support her story that she did not know about the drugs." In other words, Mangan made the decision to present Trick's perjured testimony to the jury, and Trick's lack of credibility reflected directly on Mangan's defense and her refusal to accept responsibility for her actions.

{¶ 30} Since Mangan's sentence is not contrary to law, and since the trial court did not abuse its discretion in imposing sentence, her second assignment of error is overruled, and the judgment of the trial court is affirmed.

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FAIN, J. and GRADY, J., concur.

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