[Cite as *State v. Deresse*, 2009-Ohio-6725.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DAWIT N. DERESSE Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Julie A. Edwards, J. Case No. 09 CA 11 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 403
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 17, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KEN OSWALT LICKING COUNTY PROSECUTOR DANIEL H. HUSTON ASSISTANT PROSECUTOR 20 South 2nd Street, 4th Floor Newark, Ohio 43055	ROBERT C. BANNERMAN Post Office Box 77466 Columbus, Ohio 43207-0098

Wise, J.

{¶1} Appellant Dawit N. Deresse appeals his multi-count conviction for drug trafficking and possession in the Court of Common Pleas, Licking County. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} On or about May 2, 2008, officers from the Central Ohio Drug Enforcement Task Force ("CODE") met with a confidential informant and made arrangements for a controlled buy of crack cocaine from appellant. A recorded call was made to appellant, who verbally agreed to sell one-quarter ounce of crack cocaine to the informant. The informant was searched, fitted with a hidden audio recorder, and provided with $250.00 in cash. The informant was observed by officers entering the apartment residence of Amber Bonner located on Executive Drive in Newark, Ohio. The children of Ms. Bonner were present during the time of the sale. The conversation between the informant and appellant was recorded. The informant then met with the officers and turned over the contraband. The substance was tested and weighed and found to be crack cocaine with an approximate weight of 6.08 grams.

{¶3} Later that day the informant contacted appellant by telephone. The call was recorded, and another purchase was arranged. The informant was again searched, fitted with a hidden audio recorder, and provided with $450.00 in cash. Appellant was taken to the same location, where he purchased crack cocaine. Ms. Bonner's children were also present during this transaction. The recovered contraband was tested, weighed and found to be crack cocaine in the amount of 14.03 grams.

{¶4} On or about May 9, 2008, officers arranged another controlled buy through a confidential informant, who met with appellant at another apartment on Washington

Street in Newark. This location is approximately 870 feet from Blessed Sacrament Elementary School. The substance sold to the informant was tested, weighed and found to be crack cocaine in the amount of 6.92 grams.

{¶5} Later that day, CODE officers arranged a fourth controlled buy from the Executive Drive address. An informant purchased what was later tested, weighed and determined to be 14.37 grams of cocaine. Ms. Bonner's child was present during this transaction.

{¶6} Appellant was thereupon arrested. During the arrest, appellant was searched; the officers found on his person a substance later tested, weighed, and found to be crack cocaine in the amount of 3.82 grams.

{¶7} On June 13, 2008, appellant was indicted on the following eight counts:

{¶8} Count 1: Trafficking in Crack Cocaine (vicinity of a juvenile) in violation of R.C. 2925.03(A)(1)(C)(4)(d), a felony of the second degree;

{¶9} Count 2: Trafficking in Crack Cocaine (vicinity of a juvenile) in violation of R.C. 2925.03(A)(1)(C)(4)(e), a felony of the first degree;

{¶10} Count 3: Trafficking in Crack Cocaine (vicinity of a school), in violation of R.C. 2925.03(A)(1)(C)(4)(d), a felony of the second degree;

{¶11} Count 4: Trafficking in Cocaine (vicinity of a juvenile), in violation of R.C. 2925.03(A)(1)(C)(4)(d), a felony of the second degree;

{¶12} Count 5: Possession of Crack Cocaine, in an amount equal to or exceeding one gram but less than five grams, in violation of R.C. 2925.11(A)(C)(4)(b), a felony of the fourth degree;

{¶13} Count 6: Possession of Crack Cocaine, in violation of R.C. 2925.11(A)(C)(4)(e), a felony of the first degree;

{¶14} Count 7: Possession of Cocaine, in violation of R.C. 2925.11(A)(C)(4)(b), a felony of the fourth degree, with a forfeiture specification as to counts one through seven ($872.00 in cash);

{¶15} Count 8: Engaging in a Pattern of Corrupt Activities, in violation of R.C. 2923.32(A)(1), a felony of the first degree.

{¶16} On January 5, 2009, the matter came before the trial court. The State at that time asked for leave, which was granted, to amend the indictment and dismiss Counts 6, 7, and 8. Appellant thereupon withdrew his previously entered not guilty pleas, and entered pleas of no contest to Counts 1 through 5. The trial court ordered a pre-sentence investigation report. The court advised appellant of the imposition of post-release control, and found him guilty of Counts 1 though 5.

{¶17} On January 5, 2009, appellant was sentenced to a stated prison term of four years on Count 1, four years on Court 2, five years on Count 3, four years on Count 4, and one year on Count 5, with all counts running consecutively, for a total term of eighteen years.

{¶18} On February 9, 2009, appellant filed an untimely notice of appeal, which we have permitted to proceed on a delayed basis. See App.R. 5(A). He herein raises the following three Assignments of Error:

{¶19} "I. APPELLANT WAS SENTENCED IN VIOLATION OF LAW.

{¶20} "II. APPELLANT'S CONVICTIONS PREDICATED UPON THE OFFENSES TAKING PLACE IN THE PRESENCE OF JUVENILES WAS (SIC) AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶21} III. APPELLANT'S PLEA WAS NOT KNOWING, INTELLIGENT OR VOLUNTARILY GIVEN."

I.

{¶22} In his First Assignment of Error, appellant challenges his sentence on the basis that the possession charge (Count 5) was an allied offense of similar import to the remaining trafficking charges (Counts 1 through 4).

{¶23} R.C. 2941.25 reads as follows:

{¶24} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶25} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶26} In *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699, 1999-Ohio-291, the Ohio Supreme Court held that offenses are of similar import if the offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." Id. The *Rance* court further held that courts should compare the statutory elements in the abstract. Id.

{¶27} In further clarifying *Rance,* the Court, in *State v. Cabrales*, 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, syllabus, instructed as follows:

{¶28} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import." According to *Cabrales*, the sentencing court, if it has initially determined that two crimes are allied offenses of similar import, then proceeds to the second part of the two-tiered test and determines whether the two crimes were committed separately or with a separate animus. Id. at 57, 886 N.E.2d 181, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

{¶29} The Eighth Appellate District has described the *Cabrales* clarification as a "holistic" or "pragmatic" approach, given the Ohio Supreme Court's concern that *Rance* had abandoned common sense and logic in favor of strict textual comparison. *State v. Williams*, Cuyahoga No. 89726, 2008-Ohio-5286, ¶ 31, citing *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677. This court has referred to the *Cabrales* test as a "common sense approach." *State v. Varney*, Perry App. No. 08-CA-3, 2009-Ohio-207, ¶ 23.

{¶30} We thus reach the question in the case sub judice of whether appellant's convictions for drug trafficking were allied offenses vis-à-vis his conviction for drug possession.

{¶31} Appellant's convictions for trafficking in cocaine/crack cocaine were based on R.C. 2925.03(A)(1), which states: "No person shall knowingly *** [s]ell or offer to sell a controlled substance."

{¶32} Appellant's crack cocaine possession charge was based on R.C. 2925.11(A), which states: "No person shall knowingly obtain, possess, or use a controlled substance."

{¶33} *Cabrales*, supra, not only sets forth an analytical framework for allied offense issues in general, but coincidentally addresses the very statutes applicable in the present appeal. The Supreme Court in *Cabrales* stated: "Trafficking under R.C. 2925.03(A)(1) requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it. Conversely, possession requires no intent to sell. Therefore, possession under R.C. 2925.11(A) and trafficking under R.C. 2925.03(A)(1) are not allied offenses of similar import, because commission of one offense does not necessarily result in the commission of the other." Id. at ¶ 29.

{¶34} Because *Cabrales* is so clearly on point in regard to the present assigned error, it is not necessary that we reach the Ohio Supreme Court's additional allied offense analyses under *State v. Brown*, 119 Ohio St.3d 447, 895 N.E.2d 149, 2008-Ohio-4569 and *State v. Winn*, 121 Ohio St.3d 413, 905 N.E.2d 154, 2009-Ohio-1059, and it is not necessary that we consider appellant's contention that his offenses in this matter were committed with the same animus.

{¶35} We therefore find no error under the circumstances of this case in the trial court's redress of the issue of allied offenses of similar import. Appellant's First Assignment of Error is overruled.

II.

{¶36} In his Second Assignment of Error, appellant contends the aspects of his convictions for trafficking drugs in the vicinity of juveniles (Counts 1, 2, and 4) were against the manifest weight of the evidence.

{¶37} It is well-established that an appellant is precluded from raising a manifest weight claim on appeal after entering a plea of no contest. See, e.g., *State v. Gronbach* (July 1, 1999), Fairfield App. No. 98CA73, citing *State v. Wells* (Feb. 16, 1999), Warren App. No. CA98-05-057. "By entering a plea of no contest, appellant has waived certain constitutional rights, including the right to have the state prove its case beyond a reasonable doubt." Id., additional citations omitted. We thus decline to further address appellant's manifest weight claim in the present appeal.

{¶38} Although not set forth in the text of this assigned error, appellant also raises a sufficiency of the evidence claim. In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. We have concluded that a plea of no contest constitutes an admission of the facts alleged in the indictment and waives any argument concerning the sufficiency of the evidence. See *State v. Baush*, Delaware App.No. 05 CAC 08 0049, 2006-Ohio-3927, ¶ 23, citing Crim.R. 11(B). However, a no contest plea still leaves open for review the sufficiency of the indictment. See *State v. Palm*, Summit App.No. 22298, 2005-Ohio-1637, ¶ 13. Thus, "[i]n order to obtain a conviction of a defendant who has pleaded no contest, the state must offer an explanation of the

circumstances to support the charge. This explanation is sufficient if it supports all the essential elements of the offense." *State v. Loper*, Licking App.No. 09-CA-0044. 2009-Ohio-5920, ¶ 18, citing *Chagrin Falls v. Katelanos* (1988), 54 Ohio App.3d 157, 159, 561 N.E.2d 992.

{¶39} We thus find that appellant's sufficiency argument, under the circumstances of this case, is limited to whether or not the prosecutor duly charged him under Ohio law with drug trafficking in the vicinity of juveniles. These "in the vicinity of juveniles" specifications elevate the felony classifications under the drug trafficking statutes. Appellant points out that when asked by the trial court if he agreed with the facts set forth by the State, he replied: "Not all of them, sir. I don't believe the kids were there at the time of the transactions." Tr., Change of Plea Hearing, at 15. However, the prosecutor at that point had already advised the court of the pertinent facts as to each charge, including that Ms. Bonner's child or children were present at the time of the transactions forming the bases of Counts 1, 2, and 4. See id. at 10-12. Furthermore, appellant signed a written no contest form, which states in pertinent part: "By pleading no contest, I understand the court will decide my guilt based upon a statement by the prosecutor in the indictment or otherwise about the evidence which would have been presented at a trial on the offenses for which I was charged." Appellee's Appendix at 2.

{¶40} Accordingly, we find appellant's sufficiency of the evidence argument is without merit.

{¶41} Appellant's Second Assignment of Error is overruled.

III.

{¶42} In his Third Assignment of Error, appellant contends his no contest plea was not voluntary, because the trial court did not sufficiently advise him that it could reject the ten-year prison sentence recommended by the prosecutor.

{¶43} Crim.R. 11(C)(2) reads as follows:

{¶44} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶45} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

{¶46} "(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

{¶47} "(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself."

{¶48} In accepting a guilty plea, a trial court must substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial

compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38. Furthermore, it is well established that a trial court is not bound to accept a sentence recommendation proposed by the prosecution. See, e.g., *Akron v. Ragsdale* (1978), 61 Ohio App.2d 107, 109, 399 N.E.2d 119.

{¶49} In the case sub judice, the transcript portion of the court's colloquy with appellant and oral sentencing runs twenty-three pages. Said transcript includes the following pertinent passages:

{¶50} "Q. Have you discussed the facts and circumstances of your case, along with all of your possible defenses or affirmative defenses fully and completely with your attorney?

{¶51} "A. Yes.

{¶52} "Q. Are you satisfied with the advice your attorney has given to you today and throughout the course of these proceedings?

{¶53} "A. Yes.

{¶54} "Q. Do you understand, Mr. Deresse, that - -

{¶55} "A. Yeah, I understand.

{¶56} "Q. Well, you understand, Mr. Deresse, should the Court permit you to change your pleas here today, the Court enter (sic) guilty findings, that generally all that is going to remain to be done is to proceed with sentencing? Do you understand that?

{¶57} "A. Yes, sir.

{¶58} "Q. Do you understand that the maximum possible penalty you could receive in this case on these five counts would consist of a term of 35 ½ years in the

state penitentiary, a fine of $70,000, a $32,500 mandatory amount, forfeiture of $872 and suspension of your driver's license? Do you understand that?

{¶59} "A. Yes.

{¶60} "Q. Do you understand that's the maximum possible penalty you could receive in this case?

{¶61} "A. Yes.

{¶62} "Q. Do you understand that's the maximum amount of time you could be required to serve in the state penitentiary without any type of credit for good behavior?

{¶63} "A. Yes.

{¶64} "Q. Do you also understand, Mr. Deresse, that should you be sentenced to the penitentiary - - well, on four of the five counts, those offenses carry terms of mandatory incarceration during which you are not permitted judicial release? Do you understand that?

{¶65} "A. Yes.

{¶66} "Q. Do you understand that those are - - you are not permitted to be sentenced to a term of community control? Do you understand that?

{¶67} "A. Yes.

{¶68} "Q. Do you further understand that upon release from the penitentiary you'll be placed on post-release control for a period of five years, and if you violate the terms of post-release control, you're subject to being returned to the penitentiary for incarceration even though you have completed your sentence? Do you understand that?

{¶69} "A. Yes.

{¶70} "* * *

{¶71} "[Defense counsel] Mr. Obora: It's my understanding that the State has indicated its willingness to recommend a term of ten years in prison for this case, and while we understand that recommendation, Mr. Deresse would like the Court to know that he feels that a slightly shorter sentence, something in the single digits, would really be more appropriate especially in light of his plea, the dismissal of certain counts and the facts of this case.

{¶72} "We would ask that he receive credit for the time he has served in the county jail while awaiting trial and sentencing on this case and would ask that the Court take these matters into consideration before entering a sentence in this matter.

{¶73} "THE COURT: Thank you. Mr. Deresse, is there anything you want to say in your own behalf before the Court imposes any sentence?

{¶74} "DEFENDANT: No, sir." Tr. at 15-17, 20.

{¶75} Upon review of the record and the totality of the circumstances surrounding the plea in this case (*State v. Carter,* supra), we find the trial court sufficiently explained the potential incarceration period, and we hold the trial court did not err in finding appellant entered a voluntary, knowing, and intelligent plea.

{¶76} Accordingly, appellant's Third Assignment of Error is overruled.

{¶77} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Licking County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ JULIE A. EDWARDS

JUDGES

JWW/d 1118

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DAWIT N. DERESSE	:	
	:	
Defendant-Appellant	:	Case No. 09 CA 11

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ JULIE A. EDWARDS_____

JUDGES