

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
WENDELL STEINER	:	Case No. 09CA005
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 08CR088

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 26, 2010

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, J.

{¶1} On November 4, 2008, the Holmes County Grand Jury indicted appellant, Wendell Steiner, on one count of trafficking in marijuana in violation of R.C. 2925.03(A)(1) and one count of possession of drug paraphernalia in violation of R.C. 2925.14(C)(1). Said charges arose from an alleged "drug buy" between appellant and a confidential informant, David Shrock.

{¶2} A jury trial commenced on March 6, 2009. The jury found appellant guilty as charged. By judgment entry filed April 1, 2009, the trial court sentenced appellant to an aggregate term of eleven months in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE CONVICTION OF APPELLANT FOR TRAFFICKING IN MARIJUANA IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶5} "THE IMPOSITION OF A PRISON SENTENCE IN THIS CASE IMPOSES AN UNNECESSARY BURDEN ON STATE RESOURCES."

I

{¶6} Appellant claims his conviction for trafficking in marijuana was against the manifest weight of the evidence because there was insufficient evidence of a sale. In the alternative, appellant claims he should have been sentenced for a misdemeanor under R.C. 2925.03(C)(3)(g). We disagree.

{¶7} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶8} Appellant was convicted of trafficking in marijuana in violation of R.C. 2525.03(A)(1) which states, "[n]o person shall knowingly***[s]ell or offer to sell a controlled substance."

{¶9} Appellant testified David Shrock, the confidential informant, brought a bag of marijuana to his residence and asked appellant to keep it for him which he did. T. at 142-143. Appellant also testified Mr. Shrock owed him \$50.00. T. at 143-144. When Mr. Shrock gave appellant the \$50.00, appellant testified the money was payment for the pre-existing debt, not for the sale of marijuana. T. at 146. When appellant handed the marijuana to Mr. Shrock, he was merely returning his marijuana to him. Id. Appellant denied ever selling marijuana. T. at 144.

{¶10} In contrast, Koula Zambounis the undercover agent, was present during the transaction and testified to the following:

{¶11} "Mr. Steiner asked if we wanted to smoke. He was rolling a joint as he was talking to us, a joint cigarette. It appeared to be marijuana. It was green, it was leafy. It didn't look like smoking tobacco. And asked if we wanted to smoke. I said 'No

thank you,' and the CI said he had a pee test so he couldn't smoke. And then Mr. Steiner asked, you know, 'What were you thinking? How much do you want?' And they discussed money that the CI had owed him, and the CI said that he wanted an eighth. He said he had \$50. That's all he had on him.

{¶12} ****

{¶13} "The CI asked Mr. Steiner. He said, 'Don't you think about fifteen is what I owe you?' and Mr. Steiner just kind of 'Hooof, I don't know.' And he said, 'Well, I have fifty.' The CI said, 'I have \$50; that's all I got. Will that cover it?' And the defendant said, 'Yes. That will do.' So the defendant removed what appeared to be a Zip-lock freezer bag.

{¶14} ****

{¶15} "He asked the CI for some cellophane, something plastic, anything to put the purported marijuana in. And my CI gave him a cigarette cellophane. He took it off the pack of the cigarettes, off of the bottom, and he handed that to the defendant. And the defendant started to remove some of it from the bag and put in there.

{¶16} ***

{¶17} "To a proportion and then my CI said to the defendant, you know, 'Could you put a little more in there? That looks a little short, and I'm giving you the fifty, so.' And he kind of rolled his eyes and laughed and put in a little bit more, and then he sealed the bag. And I remember distinctly as he was putting it away he said, the defendant said, 'I don't want to mess with anything less than a half.' " T. at 104-106.

{¶18} Agent Zambounis also testified that appellant appeared impaired, and appellant's trailer smelled of marijuana. T. at 102-103, 105. Appellant and Mr. Shrock

appeared to haggle over money, with Mr. Shrock getting credit for half of his debt and 3.8 grams (an "eighth") of marijuana, totaling a value of \$50.00 that was exchanged. The jury had the benefit of listening to the transaction as it had been recorded. State's Exhibit D.

{¶19} The jury listened to the audio recording of the transaction, as well as listened to Agent Zambounis's eyewitness interpretation of the transaction. The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260

{¶20} Upon review, we find there was sufficient evidence to reject appellant's version and support the conviction for trafficking in marijuana beyond a reasonable doubt.

{¶21} In the alternative, appellant argues the transaction constituted a gift, not a sale, and therefore R.C. 2925.03(C)(3)(g) was controlling:

{¶22} "Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree."

{¶23} We disagree with the applicability of this statute given the jury's findings. The choices established by the evidence were: 1) it was a sale for money or 2) it was a mere return of Mr. Shrock's own marijuana and not a gift.

{¶24} Upon review, we find from the evidence presented there was no indication the marijuana was a gift to support a sentence under R.C. 2925.03(C)(3)(g).

{¶25} Assignment of Error I is denied.

II

{¶26} Appellant claims his sentence of eleven months in prison imposes an unnecessary burden on state resources in contravention of R.C. 2929.13(A). We disagree.

{¶27} R.C. 2929.13 governs sentencing guidelines for various specific offenses and degrees of offenses. Subsection (A) states as follows in pertinent part:

{¶28} "Except as provided in division (E), (F), or (G) of this section and unless a specific sanction is required to be imposed or is precluded from being imposed pursuant to law, a court that imposes a sentence upon an offender for a felony may impose any sanction or combination of sanctions on the offender that are provided in sections 2929.14 to 2929.18 of the Revised Code. The sentence shall not impose an unnecessary burden on state or local government resources."

{¶29} As we noted in *State v. Ferenbaugh* (February 26, 2004), Ashland App. No. 03COA038, 2004-Ohio-977, "[t]he very language of the cited statute grants trial courts discretion to impose sentences. Nowhere within the statute is there any guideline for what an 'unnecessary burden' is."

{¶30} Appellant argues "[t]here are several mitigating factors in this case, including the small amount of marijuana, the small amount of money involved, Appellant's prior injuries leading to his use of marijuana, and the fact that Appellant has never been accused of trafficking before or after this incident." Appellant's Brief at 16. Therefore, an eleven month sentence on a fifth degree felony imposes an unnecessary burden on state resources.

{¶31} The record indicates appellant was convicted of theft on two occasions. T. at 162. We find the least impact on local and state government resources in this case would be imprisonment.

{¶32} Upon review, we find no evidence to indicate the sentence in this case is an unnecessary burden on state resources.

{¶33} Assignment of Error II is denied.

{¶34} The judgment of the Court of Common Pleas of Holmes County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ Patricia A. Delaney

JUDGES

