[Cite as *State v. Lenoir*, 2010-Ohio-4910.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 10CAA010011
MICHAEL D. LENOIR	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Delaware County Common Pleas Court, Case No. 09CRI070357
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 5, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
DAVID YOST CAROL HAMILTON O'BRIEN 140 North Sandusky Street Delaware, OH 43015	SUSAN E. MALLOY 1799 West Fith Avenue Suite 202 Columbus, OH 43212

Gwin, P.J.

{¶1} Defendant-appellant, Michael D. Lenoir, appeals his convictions on possession of cocaine a second-degree felony, in violation of R.C. 2925.11(A); and (C) (4) (d); possession of heroin a first-degree felony, in violation of R.C. 2925.11(A) and (C) (6) (e); and possession of crack cocaine a fifth-degree felony, in violation of R.C. 2925.11(A) and (C) (4) (a). The plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Ohio State Highway Patrol Trooper Marcus Pirrone testified that on July 4, 2009, around 7:00 a.m. he and Trooper Reggie Streicher were observing traffic on Interstate I-71, milepost 121 when he observed a black Cadillac, four-door sedan and a red Grand Cherokee Jeep approaching at a high rate of speed. Trooper Pirrone mounted his motorcycle and began pursuing the vehicles. Trooper Pirrone testified that the Cadillac eventually stopped, however the Jeep slowed down to approximately five or six miles per hour. The Jeep's driver stared at the Trooper, drove past and then "just punched it."(T. at 19). Trooper Pirrone gave a verbal warning to the driver of the Cadillac and began to pursue the red Jeep. Trooper Pirrone testified that he observed the driver of the Jeep through the windshield as the vehicle approached him and then through the passenger side window. Because the driver of the Jeep had slowed down, Trooper Pirrone was able to see the face of the driver, whom he identified as appellant.

{¶3} Trooper Pirrone observed appellant exit the highway and proceed through a red light. The appellant proceeded through a second red light and turned left onto Galena Road. Trooper Pirrone followed, but lost sight of the Jeep. The trooper decided to double back. He was then able to observe the Jeep parked in a driveway. Trooper

Pirrone observed that a yard ornament had been knocked over in the driveway. Further, the Jeep's brake lights were on then went off. Appellant exited the Jeep and began to run. Trooper Pirrone observed a "black sweatshirt or possibly a black bag" in appellant's hand at the time he exited the Jeep. Trooper Pirrone pursued the appellant who dropped the black object as he continued to flee the officer. During this pursuit, the trooper called for back-up officers. Trooper Pirrone decided to return to the Jeep, in case appellant decided to double back, return to the Jeep and leave the area. Pictures from the scene show a black object on the patio where Trooper Pirrone said he saw appellant drop a black object.

{¶4} Additional troopers arrived to assist and stayed at the scene. No one touched the sweatshirt on the ground until Sergeant Steven Click of the Ohio State Highway Patrol verified the sweatshirt did not belong to the homeowner. There were no civilians on the property when the troopers initially arrived. Ms. Norman, the homeowner, did not come out of the house until Sergeant Click knocked on her door.

{¶5} Sergeant Click retrieved the black sweatshirt from the area where Trooper Pirrone indicated that appellant had dropped a black object. Sergeant Click picked up the sweatshirt after ascertaining that it did not belong to the homeowner and a baggie of a material fell out onto the patio. Sergeant Click believed the material was an illegal drug and secured the baggie in his motorcycle. The baggie of material was analyzed and found to weigh 100.07 grams and was a mixture of heroin and cocaine.

{¶6} The homeowner, Sharon Norman, testified that the black sweatshirt was not hers, that she did not own a black sweatshirt and that there was no black

sweatshirt on her patio when she went to bed the evening before at approximately 12:00 am, 1:00 am.

{¶7} When the back-up officers arrived, Trooper Pirrone returned to the foot pursuit. During the pursuit, one of the back-up officers contacted Trooper Pirrone to advise that the officers discovered crack cocaine inside the Jeep and a bag of what appeared to be drugs inside the black sweatshirt Trooper Pirrone saw appellant drop.

{¶8} Appellant ran into a wooden area and attempted to hide from the officers underneath some brush. The canine officer located appellant. After refusing to come out, the officer released his dog. Appellant subsequently surrendered. When the officers located appellant, appellant, admitted that the crack cocaine found inside the Jeep belonged to him. He stated, "The small crack in the car, that one is mine." (T. at 33).

{¶9} The jury found appellant guilty of the following three offenses: (1) second-degree felony cocaine possession, in violation of R.C. 2925.11(A) and (C)(4)(d); (2) first-degree felony heroin possession, in violation of R.C. 2925.11(A) and (C)(6)(e); and (3) fifth-degree felony crack cocaine possession, in violation of R.C. 2925.11(A) and (C)(4)(a).

{¶10} At the sentencing hearing, the state elected to proceed to sentencing on the first-degree felony heroin possession count. The court then sentenced appellant to a mandatory five-year prison term for this offense and to an eight-month prison term for the crack cocaine possession offense. The court ordered appellant to serve the prison terms consecutively. In accordance with R.C. 2941.25, the trial court did not impose a sentence for the second-degree felony cocaine possession offense.

{¶11} Appellant timely appeals his conviction and sentence raising five assignments of error:

{¶12} "I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE REGARDING THE SWEATSHIRT AND THE COCAINE-HEROIN MIXTURE WHEN THE STATE FAILED TO ESTABLISH AN ADEQUATE CHAIN OF CUSTODY.

{¶13} "II. THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL REGARDING THE SECOND-DEGREE FELONY COCAINE POSSESSION OFFENSE AND FIRST-DEGREE FELONY HEROIN POSSESSION OFFENSE WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT APPELLANT KNOWINGLY POSSESSED AN AMOUNT OF COCAINE EQUAL TO OR EXCEEDING 100 GRAMS AND AN AMOUNT OF HEROIN EQUAL TO OR EXCEEDING 50 GRAMS.

{¶14} "III. THE JURY'S VERDICTS CONVICTING APPELLANT OF SECOND-DEGREE FELONY COCAINE POSSESSION AND FIRST-DEGREE FELONY HEROIN POSSESSION ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE STATE DID NOT PRESENT ANY COMPETENT, CREDIBLE EVIDENCE THAT APPELLANT KNOWINGLY POSSESSED MORE THAN 100 GRAMS OF COCAINE AND MORE THAN 50 GRAMS OF HEROIN.

{¶15} "IV. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE TERMS OF IMPRISONMENT WITHOUT MAKING ANY FINDINGS TO SUPPORT CONSECUTIVE SENTENCES AND WITHOUT PROVIDING ANY REASONING TO SUPPORT ITS DECISION TO IMPOSE CONSECUTIVE SENTENCES.

{¶16} “V. THE TRIAL COURT ERRED BY IMPOSING A FIVE-YEAR PRISON SENTENCE FOR THE HEROIN OFFENSE.”

I.

{¶17} In his first assignment of error, appellant argues that the state failed to maintain or establish a chain of custody for the contraband forming the basis of the charge. We disagree.

{¶18} "Authentication ‘is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.' Evid.R. 901(A). The possibility of contamination goes to the weight of the evidence, not its admissibility. 'A strict chain of custody is not always required in order for physical evidence to be admissible.' *State v. Wilkins* (1980), 64 Ohio St.2d 382, 389, 18 O.O.3d 528, 532, 415 N.E.2d 303, 308; see *State v. Downs* (1977), 51 Ohio St.2d 47, 63, 5 O.O.3d 30, 38, 364 N.E.2d 1140, 1150." *State v. Ritchey* (1992), 64 Ohio St.3d 353, 360, 595 N.E.2d 915, 923 overruled on other grounds, *State v. McGuire* (1997), 80 Ohio St.3d 390, 402- 404, 686 N.E.2d 1112. Moreover, a chain of custody can be established by direct testimony or by inference. *State v. Conley* (1971), 32 Ohio App.2d 54, 60, 288 N.E.2d 296, 300. The issue of whether there exists a break in the chain of custody is a determination left up to the Trier of fact. *Columbus v. Marks* (1963), 118 Ohio App. 359, 194 N.E.2d 791. Any breaks in the chain of custody go to the weight afforded to the evidence, not to its admissibility. *State v. Blevins* (1987), 36 Ohio App.3d 147, 521 N.E.2d 1105.

{¶19} The state, therefore, is not required "to negate all possibilities of substitution or tampering. The state need only establish that it is reasonably certain that substitutions, alteration or tampering did not occur." *State v. Moore* (1973), 47

Ohio App.2d 181, 183, 353 N.E.2d 866. See, also, *State v. Thompson* (1993), 87 Ohio App. 3d 570, 582, 622 N.E.2d 735; *State v. Brown* (1995), 107 Ohio App.3d 194, 200, 668 N.E.2d 514. Furthermore, even if the chain of custody is broken, that fact alone will not render the evidence inadmissible. *State v. Walton*, Cuyahoga App. No. 88358, 2009-Ohio-1234 at ¶ 6.

{¶20} The cocaine-heroin mixture found in the sweatshirt dropped on the patio by the appellant is the same cocaine heroin mixture that was analyzed by Brandon Werry, Director of the Ohio State Highway Patrol Crime Laboratory in Columbus, Ohio and that was admitted into evidence as Exhibit 6. An authenticated chain of custody was submitted to the Jury, Exhibit 13, and the cocaine-heroin mixture and the crack cocaine submitted as Exhibits 6 and 7 were both identified as the items found by Troopers on July 4, 2009. There is no issue as to the chain of custody or authentication for the cocaine-heroin mixture or the crack cocaine after the officers at the scene discovered it.

{¶21} Appellant argues, "The state failed to carry its burden to show that the sweatshirt was not tampered with, altered, or substituted with another during the time it was left unattended."

{¶22} At all times, appellant was alone in the red Jeep. (T. at 34). Trooper Pirrone testified unequivocally that he saw appellant drop a black item, either a bag or sweatshirt on the ground while the appellant was running from him. He testified on cross-examination, "It was more like some kind of clothing item. It didn't have handles and I could see—It didn't resemble a duffle bag. It was more like some kind of clothing." (T. at 38). The only individuals in the area at the time were Trooper Pirrone

and Trooper Streicher. (T. at 29). Trooper Pirrone testified that the black sweatshirt that was ultimately recovered by Sergeant Click was found in the place where Trooper Pirrone saw appellant drop it. (T. at 41). He was twenty feet away from appellant when he saw appellant drop the sweatshirt. (Id.). When Trooper Pirrone returned to the Jeep after the initial foot chase, the black sweatshirt was still where he had previously observed it. (T. at 44). It did not appear to have been tampered with or disturbed. Pictures from the scene show a black object on the patio where Trooper Pirrone said he saw appellant drop a black object. (T. at 60; 92 State's Exhibit 3).

{¶23} A review of this matter reveals that there was a proper chain of custody. The jacket was recovered by Sergeant Click who then gave it to the laboratory for analysis. (T. at 99). Nevertheless, as stated above, even if the chain of custody was suspect, the baggie would still have been admissible.

{¶24} In the present case, the state sufficiently established that substitution, alteration or tampering did not occur. Because the trial court's determinations were based on competent, credible evidence, and because the state established with a reasonable certainty that tampering, alteration or substitution did not occur, we find that the trial court did not abuse its discretion in admitting the disputed physical evidence. *State v. Trikilis,* Medina App. No. 05CA0005-M, 2005-Ohio-6085 at ¶9.

{¶25} Accordingly, appellant's first assignment of error is overruled.

II. & III.

{¶26} Because appellant's second and third assignments of error each require us to review the evidence, we shall address the assignments collectively.

{¶27} In his second assignment of error appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the state's case. In determining whether a trial court erred in overruling an appellant's motion for judgment of acquittal, the reviewing court focuses on the sufficiency of the evidence. See, e.g., *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 974; *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503.

{¶28} In his third assignment of error appellant maintains that his conviction is against the sufficiency of the evidence and against the manifest weight of the evidence, respectively.

{¶29} The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. Id.*; State v. Feliciano* (1996), 115 Ohio App.3d 646, 652, 685 N.E.2d 1307, 1310- 1311.

{¶30} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review 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 Trier of fact 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. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra. In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus.

{¶31} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offenses of possession of cocaine a second-degree felony, possession of heroin a first-degree felony and possession of crack cocaine a fifth-degree felony.

{¶32} R.C. 2925.01(K) defines possession as follows: " 'Possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a "voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession." R.C. 2901.21(D) (1).

{¶33} Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787; *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus. To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery* (1976), 46 Ohio St.2d 316, 332, 348 N.E.2d 351. Dominion and control may be proven by circumstantial evidence alone. *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93. Circumstantial evidence that the defendant was located in very close proximity to readily usable drugs may show constructive possession. *State v. Barr* (1993), 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247-248; *State v. Morales*, 5th Dist. No.2004 CA 68, 2005-Ohio-4714 at ¶ 50; *State v. Moses*, 5th Dist. No.2003CA00384, 2004-Ohio-4943 at ¶ 9. Ownership of the drugs need not be established for constructive possession. *State v. Smith*, 9th Dist. No. 20885, 2002-Ohio-3034, at ¶ 13, citing *State v. Mann*, (1993) 93 Ohio App.3d 301, 308, 638 N.E.2d 585. Furthermore, possession may be individual or joint. *Wolery*, 46 Ohio St.2d at 332, 348 N.E.2d 351.

{¶34} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." ' *State v. Jenks* (1991), 61 Ohio St.3d 259, 272, 574 N.E.2d 492 at paragraph one of the syllabus. "'Circumstantial evidence and direct evidence inherently possess the same probative value [.]" ' *Jenks,* 61 Ohio St. 3d at paragraph one of the syllabus. Furthermore, "'[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh

all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." ' *Jenks,* 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331, 130 N.E.2d 820. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt*, 164 Ohio St. at 331, 130 N.E.2d 820.

{¶35} Upon a careful review of the record and upon viewing the direct and circumstantial evidence in the light most favorable to the prosecution, this Court cannot conclude that the jury lost its way and created a manifest miscarriage of justice when it found appellant guilty of the possession of drugs offenses.

{¶36} Appellant admitted ownership of the crack cocaine found inside the Jeep. Accordingly, appellant's conviction for possession of crack cocaine a fifth-degree felony is supported by sufficient evidence and is not against the manifest weight of the evidence.

{¶37} A reasonable juror could have found that, at the least, appellant had dominion and control over and constructive possession of the vehicle containing the drugs, and that he had knowledge of drugs found inside the sweatshirt. See *Hankerson,* 70 Ohio St.2d at syllabus. Thus, appellant could have exercised dominion and control over the sweatshirt and the contents of the sweatshirt. See, e.g., *State v. King* (Sept. 18, 1996), 9th Dist. No. 95CA006173.

{¶38} Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695. (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶39} "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶40} Appellant cross-examined the witnesses and argued that he had no knowledge that the substance was concealed within the sweatshirt. Appellant further argued that the state failed to prove the sweatshirt was not tampered with during the time it was left unattended. Further, appellant argued that he did not drop the sweatshirt. However, 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.

{¶41} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶42} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes of possession of cocaine a second-degree felony, possession of heroin a first-degree felony and possession of crack cocaine a fifth-degree felony.

{¶43} We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶44} Appellant next argues that the state failed to prove either the amount of cocaine or the amount of heroin contained within the mixture necessary to elevate the

penalty for the offense to either a second degree felony [cocaine] or a first degree felony [heroin].

{¶45} When it comes to enhancing the penalty, the Supreme Court has stated that the statutory hierarchy of penalties based upon the identity and amount of the drug presupposes that a detectable amount of a controlled substance is present within the substance before the penalty enhancement applies. *State v. Chandler***,** 109 Ohio St.3d 223, 846 N.E.2d 1234, 2006-Ohio-2285, ¶ 18. In that case, the defendants pretended to sell crack but actually delivered only baking soda. They were convicted of drug trafficking and received the highest penalty enhancement for offering to sell more than 100 grams of crack cocaine. Id**.** at ¶ 19, 846 N.E.2d 1234.

{¶46} The Supreme Court determined that the defendants' convictions of drug trafficking could stand because they offered to sell drugs in violation of R.C. 2925.03(A)(1), regardless of whether actual drugs were involved. *Id.* at ¶ 9, 432 N.E.2d 802. However, the Court reversed the penalty enhancement, ruling that the state was required to prove the identity of the substance as well as a detectable amount of that substance, not for conviction but to impose the penalty enhancement. *Id.* at ¶ 16, 432 N.E.2d 802. In formulating its rationale, the Supreme Court noted that by the terms of the penalty provisions in R.C. 2925.03(C), the substance must be or contain the drug alleged. *Id.* at ¶ 18, 432 N.E.2d 802. "This language presumes that a detectable amount of cocaine is present within the substance before the penalty enhancement applies." *Id.* The Court reiterated that the statute is clear that a "substance offered for sale must contain some detectable amount of the relevant controlled substance" before a person

can be sentenced under a penalty enhancement such as R.C. 2925.03(C)(4)(g). *Id.* at ¶ 21, 432 N.E.2d 802.

{¶47} In the case at bar, R.C. 2925.11(C)(4) [Cocaine] and 2925.11 (C)(6) [Heroin] are identical in wording to the provisions of R.C. 2925.03(C) construed by the Supreme Court in Chandler. Hence, the concentration of cocaine or heroin is not dispositive. Rather, it is the mere presence of cocaine or heroin in combination with a mixture, compound, preparation or substance that is controlling.

{¶48} In the case at bar, expert testimony was presented by the state that the mixture recovered from the sweatshirt contained both cocaine and heroin. (T. at 125). Further, the substance weighed 100.07 grams. (Id. at 125). Thus, sufficient, credible evidence supports the penalty enhancing provisions of R.C. 2925.11(C).

{¶49} Accordingly, appellant's second and third assignments of error are denied.

IV.

{¶50} In his fourth assignment of error, appellant contends the trial court erred in failing to state its reasoning for imposing the two sentences consecutively. We disagree.

{¶51} Appellant essentially argues that in light of the decision of the United States Supreme Court in *Oregon v. Ice* (2009), --- U.S. ----, 129 S.Ct. 711, 172 L.Ed.2d 517, the trial court was required to literally comply with the requirements of R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) in imposing consecutive sentences in this matter. In other words, appellant urges that *Ice* has effectively warranted that Ohio trial courts return to the felony sentencing scheme in place prior to the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856.

{¶52} This Court has recently reviewed arguments identical to those raised by appellant in the case at bar. In *State v. Lynn*, Muskingum App. No. CT2009-0041, 2010-Ohio-3042, this Court reviewed our prior decisions,

{¶53} "In *State v. Elmore,* 122 Ohio St.3d 472, 912 N.E.2d 582, 2009-Ohio-3478, the Ohio Supreme Court cogently summarized *Oregon v. Ice* as "a case that held that a jury determination of facts to impose consecutive rather than concurrent sentences was not necessary if the defendant was convicted of multiple offenses, each involving discrete sentencing prescriptions." *Elmore* at ¶ 34.

{¶54} "In *State v. Williams*, Muskingum App. No. CT2009-0006, 2009-Ohio-5296, we cited *State v. Mickens*, Franklin App.No. 08AP-743, 2009-Ohio-2554, ¶ 25, for the proposition that an alteration of the *Foster* holding under *Ice* must await further review, if any, by the Ohio Supreme Court, " 'as we are bound to follow the law and decisions of the Ohio Supreme Court, unless or until they are reversed or overruled.' " We thus elected to continue to adhere to the Ohio Supreme Court's decision in *Foster*, which holds that judicial fact finding is not required before a court imposes non-minimum, maximum or consecutive prison terms Williams at ¶ 19, citing *State v. Hanning*, Licking App.No.2007CA00004, 2007-Ohio-5547, ¶ 9.

{¶55} "Since the time of filing of appellant's brief in this matter, this Court has issued additional decisions addressing *Ice.* Two of these cases, *State v. Smith,* Licking App. No. 09-CA-31, 2009-Ohio-6449, and *State v. Vandriest*, Ashland App. No. 09COA-032, 2010-Ohio-997, have apparently determined that the General Assembly's amendments to R.C. 2929.14, effective April 7, 2009, have effectively revived the requirement that a trial court make findings when imposing consecutive sentences.

However, our research does not indicate that the General Assembly has expressed an intention to reassert R.C. 2929.14(E)(4) in light of *Ice*; furthermore, *Smith*, supra, has recently been accepted for review by the Ohio Supreme Court. We are thus not inclined to rely on *Smith* and *Vandriest* as precedent in this matter. Until the Ohio Supreme Court revisits the Foster issue, we will consider it binding on Ohio appellate courts. See *State v. Mickens*, supra." Id at ¶ 10-13.

{¶56} In *State v. Arnold*, Muskingum App. No. CT2009-0021, 2010-Ohio-3125, this Court reviewed the appropriate procedure necessary for the General Assembly to re-adopt a statute that had previously been declared unconstitutional. The court in *Arnold* cited the Ohio Supreme Court's decision in *Stevens v. Ackman*, 91 Ohio St.3d 182, 743 N.E.2d 901, 2001-Ohio-249, wherein the code section in question, R.C. 2744.02(C), had previously been declared unconstitutional in its entirety. *Arnold* at ¶ 12. Citing *Ackman*, the Court noted, "Where an act is amended, the part that remains unchanged is to be considered as having continued in force as the law from the time of its original enactment, and new portions are to be considered as having become the law only at the time of the amendment. Id. at 194, 743 N.E.2d 901. R.C. 1.54 provides that a statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute." *Arnold* at ¶ 13. The *Stevens* court concluded that for the General Assembly to successfully reenact R.C. 2744.02(C), the General Assembly must have intended the act to have that effect. *Id.* at 193, 743 N.E.2d 901. Id.

{¶57} The *Arnold* Court concluded,

{¶58} "H.B. No. 130 amended R.C. 2929.14 effective April 7, 2009. However, there were no changes made to R.C. 2929.14(E)(4), and the only change in R.C. 2929.14 was to R.C. 2929.14(D)(2)(b)(ii). Such amendment served only to substitute subsection (C)(C) for subsection (D)(D) in a reference to R.C. 2929.01(1), to comport with the renumbering of R.C. 2929.01(1) pursuant to an amendment to R.C. 2929.01(1). OH Legis 173(2008). R.C. 2929.14(E)(4) appears in regular type, without any indication pursuant to R.C. 101.53 which would indicate new material.

{¶59} "Therefore, the amendment of R.C. 2929.14 effective April 7, 2009, did not operate to reenact those portions of the statute the Ohio Supreme Court severed in its *Foster* decision. Until the Ohio Supreme Court considers the effect of *Ice* on its *Foster* decision, we are bound to follow the law as set forth in Foster." Id. at ¶ 16-17.

{¶60} Accordingly, we herein reject appellant's claim that the trial court was required to make pre-*Foster* findings in sentencing appellant.

{¶61} Appellant's fourth assignment of error is overruled.

V.

{¶62} In his fifth assignment of error, appellant argues the trial court erred in sentencing him to a five-year prison term for possession of heroin, a first-degree felony. We disagree.

{¶63} There is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S.Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi,* Licking App. No.2006-CA-41, 2006-Ohio-5823. An individual has no substantive right

to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205, 51 L.Ed.2d 393; *State v. Goggans,* Delaware App. No.2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words "[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction ... It is not the duration or severity of this sentence that renders it constitutionally invalid...." *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690.

{¶64} In a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The first step is to "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." *Kalish* at ¶ 4. If this first step "is satisfied," the second step requires the trial court's decision be "reviewed under an abuse-of-discretion standard." Id.

{¶65} As a plurality opinion, *Kalish* is of limited precedential value. See *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (characterizing prior case as "of questionable precedential value inasmuch as it was a plurality opinion which failed to receive the requisite support of four justices of this court in order to constitute controlling law"). *See, State v. Franklin* (2009), 182 Ohio App.3d 410, 912 N.E.2d 1197, 2009-Ohio-2664 at ¶ 8. "Whether Kalish actually clarifies the issue is open to debate. The opinion carries no syllabus and only three justices concurred in the decision. A fourth concurred in judgment only and three justices dissented." *State v.*

Ross, 4th Dist. No. 08CA872, 2009-Ohio-877, at FN 2; *State v. Welch,* Washington App. No. 08CA29, 2009-Ohio-2655 at ¶ 6.

{¶66} Nevertheless, until the Supreme Court of Ohio provides further guidance on the issue, we will continue to apply *Kalish* to appeals involving felony sentencing. *State v. Welch,* supra*; State v. Reed,* Cuyahoga App. No. 91767, 2009-Ohio-2264 at FN 2.

{¶67} The Supreme Court held, in *Kalish,* that the trial court's sentencing decision was not contrary to law. "The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post-release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law." *Kalish* at ¶ 18. The Court further held that the trial court "gave careful and substantial deliberation to the relevant statutory considerations" and that there was "nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable." *Kalish* at ¶ 20; *State v. Wolfe*, Stark App. No. 2008-CA-00064, 2009-Ohio-830 at ¶ 25.

{¶68} The relevant sentencing law is now controlled by the Ohio Supreme Court's decision in *State v. Foster,* i.e. " * * * trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." 109 Ohio St.3d 1, 30, 2006-Ohio-856 at ¶ 100, 845 N.E.2d 470, 498.

{¶69} In the first step of our analysis, we review whether the sentence is contrary to law. In the case at bar, appellant was convicted of possession of heroin,

over 100 grams, a felony in the first degree. The sentencing range for a first-degree felony is three, four, five, six seven, eight, nine or ten years. R.C. 2929.14(A)(1). The trial court sentenced appellant to five years in prison, which is in the middle range of sentences available.

{¶70} Upon review, we find that the trial court's sentencing on the charge complies with applicable rules and sentencing statutes. The sentence was within the statutory sentencing range. Furthermore, the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in Sections 2929.11 and 2929.12 of the Ohio Revised Code and advised appellant regarding post release control. Therefore, the sentence is not clearly and convincingly contrary to law.

{¶71} Having determined that the sentence is not contrary to law we must now review the sentence pursuant to an abuse of discretion standard. *Kalish* at ¶ 4; *State v. Firouzmandi,* supra at ¶ 40. In reviewing the record, we find that the trial court gave careful and substantial deliberation to the relevant statutory considerations

{¶72} The court noted that appellant had previously been incarcerated after having his community control revoked. Further, appellant was under indictment in Summit County when he was arrested on this charge. The amount of cocaine-heroin mixture he possessed was a large amount – much more than for personal use. Appellant’s convictions include felonious assault with a firearm specification, trafficking in cocaine, aggravated possession of drugs, endangering children and weapons under disability. Further, the court considered the fact that while on bond in Delaware County he violated his bond by testing positive for both cocaine and marijuana.

{¶73} Accordingly, there is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that her sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. *State v. Firouzmandi,* supra at ¶ 43.

{¶74} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of felony sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11.

{¶75} Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under the Ohio and United States Constitutions in its sentencing appellant to the term of five years incarceration for possession of heroin a first-degree felony. Further, the sentence in this case is not so grossly disproportionate to the offense as to shock the sense of justice in the community.

{¶76} Appellant’s fifth assignment of error is overruled.

{¶77} The judgment of the Delaware County Court of Common Pleas is affirmed.

By Gwin, P.J. and

Wise, J., concur;

Hoffman, J., concurs in part,

dissents in part

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE

WSG:clw 0914

Hoffman, J., concurring in part and dissenting in part

{¶78} I concur in the majority's analysis and disposition of Appellant's first, fourth and fifth assignments of error.

{¶79} I further concur in the majority's analysis and disposition of Appellant's second and third assignments of error, except for its decision to affirm Appellant's conviction for heroin possession as a first degree felony and cocaine possession as a second degree felony.

{¶80} R.C. 2925.11(A) and (C)(6)(e) require the State to prove Appellant possessed heroin in an amount equaling or exceeding fifty grams but less than two hundred fifty grams. R.C. 2925.11(A) and (C)(4)(d) require the State to prove Appellant possessed cocaine in an amount equaling or exceeding one hundred grams but less than five hundred grams.

{¶81} Though I agree the State proved Appellant possessed a "detectable" amount of both heroin and cocaine, the State did not prove the amount Appellant possessed of each individual drug involved. Though the mixture of the two drugs exceeds one-hundred grams, there is no evidence as to the amount of each individual drug involved. Subsections (C)(6)(e) and (C)(4)(d) require evidence the amount of the drug involved, not the compound, mixture, preparation or substance containing the drug, equal or exceed a certain minimum amount.

{¶82} As such, I find Appellant's conviction regarding these two counts should have only been for possession of heroin as a felony of the fifth degree and for possession of cocaine as a felony of the fifth degree.

_____

HON. WILLIAM B. HOFFMAN

[Cite as *State v. Lenoir*, 2010-Ohio-4910.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MICHAEL D. LENOIR	:	
Defendant-Appellant	:	CASE NO. 10CAA010011

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JOHN W. WISE