[Cite as *State v. Houston*, 2011-Ohio-363.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-10-010

Appellee — Trial Court No. 09 CR 186

v.

Robert J. Houston — **DECISION AND JUDGMENT**

Appellant — Decided: January 28, 2011

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney,
for appellee.

Clayton M. Gerbitz, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the May 4, 2010 judgment of the Williams County Court of Common Pleas, which sentenced appellant, Robert J. Houston, after he was convicted by a jury of violating R.C. 2925.04(A)(C)(3)(a), illegal manufacture of drugs, a felony of the second degree, and R.C. 2925.11(A)(C)(1)(e), aggravated possession of drugs, a felony of

the first degree. Upon consideration of the assignment of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT BY PROHIBITING RELEVANT EVIDENCE AT TRIAL OF THE COMPOSITION OF THE CHEMICAL MIXTURE WHEN TWO WITNESSES TESTIFIED THAT THE MIXTURE WAS NOT YET METHAMPHETAMINE CAPABLE OF BEING INGESTED."

{¶ 3} The prosecution filed a motion in limine in this case to exclude any evidence from trial "* * * pertaining to either of the following: (1) the purity of the controlled substance or compound, mixture, or preparation that contains methamphetamine and forms the basis for the charge in Count II of the Indictment; or (2) the amount of methamphetamine that might or could be yielded from the liquid substance that contains methamphetamine and forms the basis for the charge in Count II of the Indictment." The court granted the motion finding that the issue of the amount of crystallized methamphetamine that might have been produced in the seized baggie was irrelevant to the case so long as the mixture contained some methamphetamine. The case proceeded to trial and appellant was convicted of both offenses for which he was charged.

{¶ 4} Appellant was arrested as he was returning from a secluded area where he mixed the chemicals needed to manufacture methamphetamine. His co-defendant, Arland Meyer testified that after they placed the chemical mixture in a Ziploc bag, they still needed to finish "smoking" the mixture. They had to add salt and liquid fire to another bottle and then run a hose from that bottle to the baggie. Then, the mixture will

start to form crystallized methamphetamine. After the crystals form, they would drain off the byproducts. An investigation officer testified that there is no exact process used by criminals to make methamphetamine. But, he described a process similar to that described by Meyer using different chemicals. At trial, appellant proffered evidence that the weight of the drug, if it had been allowed to crystallize, would have been approximately 11 grams. He argued that this weight, and not the entire weight of the fluid in the baggie, which was 435.2 grams, should be used in determining the degree of felony involved.

{¶ 5} Scott Dobransky, a forensic chemist at the Ohio Bureau of Criminal Identification, testified that he analyzed the baggie that was seized from appellant. The weight of the liquid in the baggie was 435.2 grams. He determined that the liquid was an organic solvent of some type and that traces of crystal methamphetamine were present.

{¶ 6} On appeal, appellant argues only that the trial court erred as a matter of law by granting appellee's motion in limine and excluding evidence related to the weight of the crystallized methamphetamine that would have formed after the mixture in the seized baggie had completed its chemical reaction.

{¶ 7} The prosecution relied upon *State v. Neal* (June 29, 1990), 3d Dist. No. 5-89-6; *State v. Brown* (1995), 107 Ohio App.3d 194; and *State v. Chandler*, 157 Ohio App.3d 672, 2004-Ohio-3436, in support of its argument that the content or purity of a controlled substance is irrelevant. In each case, the court recognized that it is the role of the legislature to determine what constitutes a controlled substance and what constitutes the bulk amount of

that controlled substance. Finding that there was no ambiguity in the language of the statute, each court applied the statute as written and held that evidence relating to the content or purity of the controlled substance was immaterial to the case. The trial court in the case before us specifically noted that the defendant did not base his argument on constitutional grounds, but solely on statutory application.

{¶ 8} Appellant argues that the Ohio cases are distinguishable because they involve the issue of the sale of impure cocaine or the entire marijuana plant. Appellant contends that a better analysis of the unique issues presented when the controlled substance is methamphetamine is set forth in *U.S. v. Jennings* (1991), 945 F.2d 129. In that consolidated case, the defendants' convictions and sentences were based upon the total weight of a chemical mixture found in a Crockpot at the time of their arrest rather than the projected weight of the methamphetamine produced by the process. The chemist who testified did not know how much of the mixture, if any, had reacted to form methamphetamine at the time of arrest.

{¶ 9} The Sixth Circuit affirmed the convictions for possession of methamphetamine based upon circumstantial evidence that some methamphetamine must have been present because the mixture had been cooking for 7 out of the 12 hours necessary to produce methamphetamine. But, the court reversed the sentences finding that the district court had erred in applying the Federal Sentencing Guidelines. For sentencing purposes, the weight of the large volume of the poisonous mixture (4,180 grams) was used rather than the weight of

the final product which would have resulted if the mixture had been allowed to complete its reaction and form pure, ingestible methamphetamine (over 100 grams).

{¶ 10} While the Sixth Circuit found that the plain language of the statute required the total weight of the mixture to be used, the intent of the statute was to graduate sentencing based on the amount of marketable drug involved, despite its form or purity as set forth in *Chapman v. United States* (1991), 500 U.S. 453. Therefore, the court determined that the use of the entire weight of the indigestible, poisonous methamphetamine mixture resulted in an illogical result and was contrary to the intent of the statute because the final weight of the marketable drug would have been significantly less. Other circuits have reached a similar conclusion. *U.S. v. Jackson* (C.A.11, 1997), 115 F.3d 843. Yet in some cases the courts have rejected the argument. *U.S. v. Mueller* (C.A.5, 1990), 902 F.2d 336, 345, and *U.S. v. Walker* (C.A.5, 1992), 960 F.2d 409. But, these are federal cases applying federal sentencing guidelines. That is not the issue before us.

{¶ 11} We agree with appellant that there is a factual distinction as far as marketability is concerned between weighing the entire unit of impure cocaine versus weighing the entire methamphetamine mixture that has not finished processing. But, the General Assembly has certainly considered this issue and other issues in drafting the statutes governing how each controlled substance shall be weighed.

{¶ 12} Appellant's assignment of error relates only to the application of R.C. 2925.01(D)(1) to his case. There is no need for a court to interpret a statute where the "* * * meaning of the statute is unambiguous and definite." *State ex rel. Savarese v. Buckeye Local*

School Dist. Bd. of Edn. (1996), 74 Ohio St.3d 543, 545. Instead, the court must apply the statutory law as it is written. *State v. Jordan* (2000), 89 Ohio St.3d 488, 492. In the case before us, R.C. 2925.11(A) and (C)(1)(e) provide that:

{¶ 13} "(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶ 14} "* * *.

{¶ 15} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶ 16} "(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

{¶ 17} "(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code."

{¶ 18} R.C. 2925.01(D)(1) defines "bulk amount" of a controlled substance as:

{¶ 19} "(1) *For any compound, mixture, preparation,* or substance included in schedule I, schedule II, or schedule III, with the exception of marihuana, cocaine, L.S.D.,

heroin, and hashish and except as provided in division (D)(2) or (5) of this section, whichever of the following is applicable:

{¶ 20} "* * * .

{¶ 21} "(g) An amount equal to or exceeding *three grams of a compound, mixture, preparation,* or substance *that is or contains any amount* of a schedule II stimulant, or any of its salts or isomers, that is not in a final dosage form manufactured by a person authorized by the Federal Food, Drug, and Cosmetic Act and the federal drug abuse control laws." (Emphasis added.)

{¶ 22} The Ohio statute is clearly written to provide that the entire weight of the mixture of chemicals that will produce methamphetamine is to be used if it contains any amount of methamphetamine and not the final weight of the methamphetamine crystals that could have formed. For whatever reason, the General Assembly has determined that this is the proper method of determining the bulk amount for this type of controlled substance. Therefore, the trial court does not err as a matter of law when it applies the law as it is written. Appellant's sole assignment of error is not well-taken.

{¶ 23} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE