

[Cite as *State v. Cole*, 2010-Ohio-6639.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91305

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARIO COLE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-468025

BEFORE: Gallagher, A.J., Boyle, J., and Sweeney, J.

RELEASED: March 11, 2010

JOURNALIZED: March 22, 2010

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

SEAN C. GALLAGHER, A.J.:

{¶ 1} This cause is before us on remand from the Ohio Supreme Court to reconsider our decision in light of the court's recent decision in *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939, 916 N.E.2d 775.

{¶ 2} In *State v. Cole*, Cuyahoga App. No. 91305, 2008-Ohio-6647, we reversed and vacated the conviction of defendant-appellant, Mario Cole, for illegally conveying drugs into a detention facility, finding that entering the detention facility under arrest was not a voluntary act. We affirmed Cole's conviction for possession of drugs with a one-year firearm specification.

{¶ 3} We certified a conflict to the Ohio Supreme Court for resolution of the following issue:

"Whether an individual charged with a violation of R.C. 2921.36, conveying a drug of abuse onto the grounds of a detention facility, acts voluntarily, as required by R.C. 2901.22(A)(1), when the individual is taken to a detention facility under arrest."

{¶ 4} The Ohio Supreme Court accepted this same issue on discretionary appeal for *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783; see *State v. Cargile*, 120 Ohio St.3d 1415, 2008-Ohio-6166, 897 N.E.2d 651 (Table).

{¶ 5} In *Cargile*, the defendant entered the detention facility under arrest and had drugs in his pants cuffs. This court reversed his conviction, finding that the defendant's entrance into the detention facility with drugs

was not a voluntary act because he was under arrest. *Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2738. The Ohio Supreme Court disagreed and held that “a person who is taken to a detention facility after his arrest and who possesses a drug of abuse at the time he enters the facility meets the actus reus requirement for a violation of R.C. 2921.36(A)(2).” *Cargile*, 123 Ohio St.3d at 346. The court reasoned that although the defendant did not have any choice in going to jail following his arrest, the fact that his entry into the jail was not voluntary does not make his conveyance of drugs into the detention facility an involuntary act. *Id.* at 345. The court noted that the defendant did not reveal his possession of drugs during any of the searches and affirmatively concealed the drugs by telling the officers that he did not possess anything the officers needed to be concerned about. *Id.* The defendant was warned that bringing drugs into the facility would result in felony charges, but he still declined opportunities to end his possession of the drugs before entering the facility. *Id.* The court concluded that the defendant’s act was voluntary. *Id.*

{¶ 6} The Ohio Supreme Court remanded *State v. Cole*, Cuyahoga App. No. 91305, 2008-Ohio-6647, to this court, stating that the certified question was answered by *Cargile*, *supra*, and instructed this court to consider whether the absence of both an officer’s warning and the defendant’s denial of possession of contraband, if applicable, would alter the result, consistent with

the opinion rendered in *Cargile*. See *State v. Cole*, 124 Ohio St.3d 98, 2009-Ohio-6411, 919 N.E.2d 211. The supreme court noted, however, that “whether a warning by an officer and a denial of possession of contraband by the defendant are required prior to a conviction for illegal conveyance was not a consideration before this court in *State v. Cargile*.” *Cole*, 124 Ohio St.3d at 98-99.

{¶ 7} In the case at bar, a search of Mario Cole on scene and at the detention facility did not reveal any contraband. After he was booked, the guards received a telephone call, which prompted a third search of Cole. This search uncovered a plastic baggie containing several small rocks of crack cocaine hidden in Cole’s jacket sleeve. Unlike in *Cargile*, nothing appears in the record to suggest that Cole was warned about conveying drugs into a detention facility or that Cole affirmatively denied having drugs in his possession.

{¶ 8} R.C. 2921.36(A)(2), prohibits the knowing conveyance, or attempted conveyance, of any drug of abuse onto the grounds of a detention facility. Under R.C. 2901.21(A), a person is not guilty of a criminal offense unless (1) the person’s liability is based on either a voluntary act or an omission to perform an act or duty; and (2) the person has the requisite degree of culpability for each element as to which a culpable mental state is specified in the statute defining the offense.

{¶ 9} A review of the statutes and *Cargile* requires that we reverse our original holding regarding Cole's conviction for illegally conveying drugs into a detention facility. Although Cole did not have any choice in going to jail following his arrest, the fact that his entry into the jail was not voluntary does not make his conveyance of drugs into the detention facility an involuntary act. Further, nothing in the statutes or *Cargile* requires that the defendant be warned that conveying drugs into a detention facility is a separate crime from possession of drugs. Moreover, a denial or lie by a defendant regarding his possession of an illegal substance is not required to prove illegal conveyance. Just like in *Cargile*, Cole was conscious and aware of the physical presence of the drugs hidden in his jacket sleeve, but did not reveal his possession of the drugs during any of the searches. Cole passed up opportunities to end his possession of the drugs before entering the facility. Finally, Cole's Fifth Amendment right does not protect him from having to make difficult choices about remaining silent or committing another felony.

{¶ 10} Accordingly, we reverse our previous holding regarding Cole's conviction for illegally conveying drugs into a detention facility, but leave intact our decision regarding Cole's conviction for possession of drugs with a firearm specification. See *State v. Cole*, Cuyahoga App. No. 91305, 2008-Ohio-6647. We order the lower court to reinstate Cole's previous conviction.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR