[Cite as *State v. Siggers*, 2010-Ohio-1353.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO	C. A. No. 09CA0028-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
RUSSELL Q. SIGGERS	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 08-CR-0449

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

MOORE, Judge.

{¶1} Appellant, Russell Siggers, appeals from the judgment of the Medina County Court of Common Pleas. We affirm in part, vacate in part, and remand for resentencing on count one.

I.

{¶2} On October 23, 2008, the Medina County Grand Jury indicted Siggers on two counts of trafficking in crack cocaine. Count one alleged that on October 9, 2008, Siggers knowingly sold or offered to sell crack cocaine in an amount equal to or exceeding five grams but less than ten grams, in violation of R.C. 2925.03(A)(1)/(C)(4)(d), a felony of the third degree. Count two alleged that on October 16, 2008, Siggers knowingly sold or offered to sell crack cocaine in an amount equal to or exceeding ten grams but less than 25 grams, in violation of R.C. 2925.03(A)(1)/(C)(4)(e), a felony of the second degree.

{¶3} Jennifer Smith is an agent with the Medina County Drug Task Force. On October 9, 2008, a confidential informant working with her contacted Siggers. Siggers was an acquaintance of the informant. Siggers agreed to sell the informant three-eighths of an ounce of crack cocaine for $450. Testimony indicated that three-eighths of an ounce is approximately equal to 10.5 grams. Smith, who was working undercover, together with the informant met Siggers at a Sheetz gas station in Medina County that night. Siggers sold the informant 4.6 grams of crack cocaine for $450.

{¶4} On October 16, 2008, the informant arranged for Siggers to meet with Agent Smith alone. In this transaction, Siggers was to sell the agent three-fourths of an ounce, or approximately 21 grams, of crack cocaine for $900. The agent met with Siggers that night at the same Sheetz gas station. Siggers sold the agent a package of what he later admitted was candle wax.

{¶5} The matter was tried to a jury on January 21, 2009 and January 22, 2009. The jury found Siggers guilty on both counts. The jury also made a special finding as to count one that Siggers sold or offered to sell equal to or greater than five grams but less than ten grams of crack cocaine. As to count two, the jury made a special finding that Siggers sold or offered to sell equal to or greater than ten grams but less than 25 grams of crack cocaine.

{¶6} Siggers timely filed a notice of appeal and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"OHIO LAW REQUIRES THE PRESENCE OF ILLICIT DRUGS IN ORDER TO SUSTAIN CONVICTIONS FOR AGGRAVATED DRUG TRAFFICKING."

{¶7} In his first assignment of error, Siggers contends that his convictions for aggravated trafficking in drugs must be reversed because the facts actually justify fourth and fifth degree trafficking in drugs, rather than second and third degree trafficking in drugs of which he was convicted and sentenced. With regard to count one, Siggers argues that on October 9, 2008, only 4.6 grams of crack cocaine were actually exchanged in the transaction. With regard to count two, he contends that on October 16, 2008 the presence of fake contraband rather than any quantity of actual crack cocaine exchanged in the transaction supports only a conviction for a felony of the fifth degree. With respect to Siggers's sentence on count one, we agree.

{¶8} Siggers's argument suggests that the trial court erred when it allowed the jury to check one of several boxes corresponding to specific amounts of contraband depending on the quantity the jury found to be proven. He provides no authority for this proposition. Accordingly, we do not consider that aspect of Siggers's argument. App.R. 16(A)(7); App.R. 12(A)(2). The remainder of Siggers's argument focuses on the fact that his counsel moved for dismissal of the aggravated trafficking charges at the close of the State's case. Accordingly, we address this assignment of error as a challenge to the sufficiency of the evidence presented in the State's case.

{¶9} Appellate review of a conviction for sufficiency of the evidence calls for a legal determination, which this Court reviews de novo. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386. "The relevant inquiry is whether, after viewing the evidence in the 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, at paragraph two of the syllabus.

{¶10} The parties' arguments require this Court to interpret the language of R.C. 2925.03 and the Supreme Court of Ohio's decision in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285.

{¶11} Chandler sold a package of material resembling freshly made cocaine in excess of 100 grams to a confidential informant. *Chandler* at ¶3. The package actually contained greater than 100 grams of baking soda. Id. At trial, Chandler was convicted of trafficking in cocaine in excess of 100 grams and was sentenced according to the corresponding subsection of R.C. 2925.03. Id. at ¶4. The conduct at issue occurred as late as July 1, 2003, and was prosecuted under the version of R.C. 2925.03 then in effect. The Fifth District Court of Appeals reversed the conviction, holding that the State must prove both the identity of the substance and a detectable amount of that substance in order to sustain a conviction under R.C. 2925.03(A) and a penalty under R.C. 2925.03(C)(4)(g). Id. at ¶5. The Supreme Court agreed. The *Chandler* court reviewed the language of the statute:

> "The penalty provision that relates to drug-trafficking cases, R.C. 2925.03(C)(4), states at the outset: 'If the drug involved in the violation is cocaine *or a compound, mixture, preparation, or substance containing cocaine*, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows [setting forth the various penalties].' (Emphasis added.)" Id. at ¶12.

{¶12} The *Chandler* court interpreted this language to mean that unless some detectable amount of the drug in question was involved in the transaction, the penalty enhancements in R.C. 2925.03(C)(4)(g) did not apply. *Chandler*, at ¶18. In order to facilitate our discussion, we consider the counts in reverse order.

COUNT TWO

{¶13} Effective September 30, 2008, the General Assembly amended R.C. 2925.03 to include subsection (I), which states: "As used in this section, 'drug' includes any substance that

is represented to be a drug." Presumably, this amendment was in response to *Chandler*. The parties to this appeal argued about the effect of R.C. 2925.03(I) during the hearing on Siggers's Crim.R. 29 motion. The trial court interpreted R.C. 2925.03(I) to modify the statute such that the penalty provisions of, e.g., R.C. 2925.03(C)(4) can be implemented when a substance such as wax is represented to be crack cocaine, even when no detectable cocaine is present in the substance. These facts appear to present a case of first impression, as we could locate no Ohio case interpreting or applying the current version of R.C. 2925.03(I). For the reasons which follow, we agree that the trial court's approach constitutes the most logical reading of the statute.

{¶14} Siggers urges a narrow reading of the statute, directing this Court to *State v. Mitchell*, 7th Dist. No. 08 JE 5, 2008-Ohio-6920. He advances the proposition that the penalty enhancement provisions in the drug trafficking statute cannot be used where the drug is fake or the defendant has literally nothing to sell. *Mitchell* simply relied upon *Chandler's* statement that the penalty enhancements of R.C. 2925.03(C) are inapplicable where no detectable trace of the alleged substance existed. Id. at ¶34. Of importance to our analysis, the underlying events in *Mitchell* occurred *prior to* the effective date of the R.C. 2925.03(I). Id. at ¶4-5. Therefore, *Mitchell* does not control this case, and has no bearing on Count Two, which involves fake or counterfeit drugs.

{¶15} Accordingly, there was sufficient evidence to support Siggers's conviction and sentence under R.C. 2925.03(A)(1)/(C)(4)(e). That section requires that the offense involve an amount equal to or greater than ten, but fewer than 25, grams of crack cocaine or a substance represented to be crack cocaine. Siggers does not contest the amount of material in question; rather, he claims that the enhanced sentence provision cannot apply to sales of wax. Because

R.C. 2925.03(I) by its terms specifically modifies "drug" to include a substance "represented to be a drug[,]" his argument fails.

COUNT ONE

{¶16} With regard to his sentence on a felony of the third degree under R.C. 2925.03(A)(1)/(C)(4)(d), Siggers contends that because the crack cocaine sold to the confidential informant had a mass of only 4.6 grams, the evidence was insufficient to prove that the amount of the drug involved in the transaction was equal to or greater than five grams but less than ten grams. For its part, the State contends that the relevant mass is not the amount of the drug actually transferred in the sale, but instead the amount Siggers verbally *offered* to sell. This matter presents a case of first impression in this Court.

{¶17} The State urges an expansive reading of the statute. Under the State's interpretation, any amount of a substance that a defendant offers to sell, whether that amount is in existence or not, constitutes the amount of the drug "involved" for purposes of sentencing under R.C. 2925.03(C). Under the State's theory, a suspect could offer to sell a large quantity of drugs, show up with a small quantity and be convicted for trafficking in the greater amount of drugs. Siggers, on the other hand, contends that because the jury erred when it found that greater than or equal to five grams but less than ten grams of crack cocaine were involved in the offense, his conviction on Count One must be reversed. We agree.

{¶18} In *Chandler*, the Supreme Court recognized that an individual could be convicted of trafficking in drugs in violation of R.C. 2925.03(A)(1) by offering to sell a controlled substance without actually transferring the controlled substance to the buyer. *Chandler*, at ¶9. However, the plain text of the statute indicates that unless R.C. 2925.03(C)(4)(b), (c), (d), (e), (f) or (g) applies, a violation of R.C. 2925.03(A)(1) constitutes a felony of the fifth degree. R.C.

2925.03(C)(4)(b) increases penalties if the crime is committed in the vicinity of a school or juvenile, while subsections (c) through (g) provide increased penalties that correspond to increased quantities of drugs [or substances represented to be drugs] involved in the transaction.

{¶19} The State's contention is expansive because it interprets the words "amount of the drug involved" to include the amount verbally offered, even if not in existence. We interpret the language of R.C. 2925.03(C)(4)(c)-(g) pertaining to the amount of the drug or substance represented to be a drug "involved" in the offense to mean that an actual amount of a substance must exist rather than a purely hypothetical promise of a volume of drugs that may or may not exist. This reasoning is actually supported by *Mitchell*, which ultimately held that Mitchell's enhanced sentence was unsupported because he never provided any of the six Oxycontin tablets he had promised to sell. *Mitchell* at ¶34. The *Mitchell* court vacated Mitchell's sentence and remanded for resentencing according to the proper degree of the offense. Id. at ¶41. See, also, *State v. Elliott*, 8th Dist. No. 86461, 2006-Ohio-1092 (Elliott offered to sell a quarter ounce of crack cocaine that did not exist, appellate court ordered his conviction and sentence modified to reflect fifth degree felony under R.C. 2925.03(C)(4)(a)).

{¶20} In this transaction, Siggers promised to sell approximately 10.5 grams of crack cocaine. In fact, the record indicates that Siggers produced 4.6 grams of crack cocaine. The State requested that the jury find that the amount of the drug involved was greater than five grams and less than ten grams of crack cocaine and that the trial court sentence Siggers under R.C. 2925.03(A)(1)/(C)(4)(d), as a felony of the third degree. R.C. 2925.03(A)(1)/(C)(4)(d) provides an enhanced penalty when the amount of the drug or substance that is represented to be a drug involved in the offense is equal to or greater than five grams but fewer than ten grams of crack cocaine.

{¶21} In relation to this charge, the jury found Siggers guilty of selling crack cocaine and made a special finding that the amount of crack cocaine involved was an amount equal to or greater than five grams but fewer than ten grams. As all evidence indicated that Siggers actually sold 4.6 grams of crack cocaine, this finding is contrary to the evidence adduced at trial and the enhanced sentence rests upon insufficient evidence. Accordingly, Siggers's first assignment of error has merit. We vacate Siggers's sentence on count one under R.C. 2925.03(A)(1)/(C)(4)(d) and remand to the trial court for resentencing under R.C. 2925.03(A)(1)/(C)(4)(c) as a felony of the fourth degree.

ASSIGNMENT OF ERROR II

"THE ABSENCE OF THE STATE'S CONFIDENTIAL SOURCE VIOLATED DEFENDANT'S DUE PROCESS AND 6TH AMENDMENT RIGHTS."

{¶22} In his second assignment of error, Siggers contends that the State's actions in withholding the identity and criminal record of the confidential informant until one working day prior to trial violated Siggers's due process rights. We disagree.

{¶23} Siggers fails to provide any citations to the record in support of this assignment of error. App.R. 16(A)(7). Additionally, Siggers fails to provide this Court with the applicable standard of review. Siggers has the burden of affirmatively demonstrating error on appeal. *Angle v. W. Res. Mut. Ins. Co.* (Sept. 16, 1998), 9th Dist. No. 2729-M, at *1; *Frecska v. Frecska* (Oct. 1, 1997), 9th Dist. No. 96CA0086, at *2. Moreover, "[i]f an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v. Cardone* (May 6, 1998), 9th Dist. No. 18349, at *8. Accordingly, Siggers's second assignment of error is overruled.

III.

{¶24} Siggers's second assignment of error is overruled. Siggers's first assignment of error is sustained with respect to his sentence on count one under R.C.2925.03(A)(1)/(C)(4)(d). We vacate and remand to the trial court for resentencing.

Affirmed in part,
vacated in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to both parties equally.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

STEVEN R. MALYNN, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.