

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

vs.

SABRINA M. COBB

Appellant.

SUPREME COURT CASE
NO. 2014-1698

ON APPEAL FROM THE
COURT OF APPEALS,
NINTH APPELLATE
DISTRICT 13CA0087-M

MEDINA COUNTY
COURT OF COMMON PLEAS
CASE NO. 13-CR-0311

MEMORANDUM IN OPPOSITION TO JURISDICTION OF THE STATE OF OHIO

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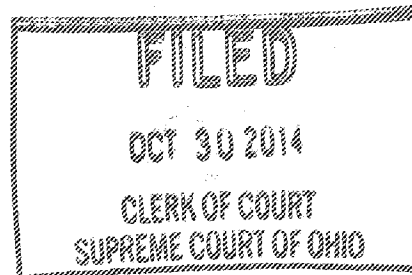
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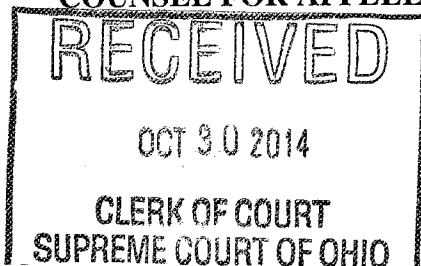
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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. This case does not present a substantial constitutional question because there is no record evidence in this case that Cobb's medical needs cannot be met in the prison system. Cobb has serious medical issues with which the State does not quarrel. These medical issues did not, however, prevent her from committing the offenses for which she was convicted and did not prevent her from continuing to use marijuana or maintaining an attitude of defiance towards the trial court or drug court personnel. Serious medical issues are not a get-out-of-jail-free card as Cobb appears to suggest.
2. This case is not of public or great general interest because there was no dispute whether Cobb has serious medical issues or whether the trial court was aware of those issues when deciding whether to impose a prison sentence. The trial court had the pre-sentence investigation report which specifically observed that Cobb has serious medical issues and Cobb's attorney noted at the hearing that she had such issues. The trial court simply followed the presumption in favor of prison in this case after considering all of the information it was required to consider. This case presents unique facts unlikely to recur and would not result in reversal either way because there was no evidence at the sentencing hearing that the state prison system is incapable of meeting Cobb's medical needs. Against this dearth of record evidence, Cobb's sentence cannot be said to be unlawful.

STATEMENT OF THE CASE AND FACTS

Cobb pleaded no contest to all three (3) offenses in this case. The facts are adduced from the pre-sentencing investigation report (PSI) which was made part of the record on appeal.

Count One

On December 27, 2012, Sabrina Cobb ("Cobb" or "Appellant") arranged to sell sixty three (63) Oxycodone pills to a confidential source working for the Medina County Drug Task Force. Cobb negotiated the sale price for the pills to be three hundred and fifteen dollars (\$315.00) and arranged to meet to make the exchange. Medina County Drug Task Force Agents Darren Stout and Agent Cindia met with the confidential source at a staging area where the source was searched for contraband. After finding no contraband on the source, Agents fitted them with a recording/transmitting device and provided the source with the buy money. They then drove the source to the meeting location, which had a tan Chevy Tahoe parked in the driveway of the address provided.

The confidential source got out of Agent Stout's car and met Cobb and a juvenile outside the Tahoe before the juvenile opened the back door of the Tahoe and followed the source into the back seat. Cobb entered the front passenger seat of the vehicle. The source gave Cobb the money and Cobb gave the source the pills. Cobb and the source discussed setting up future drug transactions and Cobb said that she would see what she could do. Cobb acknowledged in the Tahoe that the "perc 5's" she was selling were her sister's prescription but that her sister did not get her prescription filled for another month. Agents later discovered that the Tahoe also belonged to Cobb's sister. After exchanging the money for the drugs and discussing future drug transactions, the source got out of the vehicle and returned to Agent Stout's car.

Once back at the staging area, Agent Cindia searched the source again and found nothing beyond the sixty-three (63) Oxycodone pills. The pills were white tablets marked "K 18," which a check through an online database confirmed were 5 milligram Oxyconde Hydrochloride pills. Bureau of Criminal Investigation (BCI) testing later confirmed that each tablet was positive for 0.1 grams of Oxycodone.

Count Two

On January 18, 2013, the same confidential source purchased ninety (90) Oxycodone pills from Cobb for four hundred and fifty dollars (\$450.00). Agents Stout and Cindia searched the source at a staging area before fitting him with a recording/transmitting device and providing the buy money. The source called Cobb on her cell phone and confirmed that Cobb was home from work. Cobb told the source that she had just finished counting the pills and that she had ninety (90) remaining.

Agent Stout and the source drove the source to the agreed meeting location. After they pulled into Cobb's driveway, Cobb approached the vehicle's passenger side and conducted the transaction directly with Agent Stout, who exchanged the buy money for the pills. The pills were in an unmarked prescription bottle.

Agent Stout and the source returned to the staging area and the source was searched again. Agents counted the pills and checked the online database to confirm that the white tablets with the "K 18" marking were 5 milligram Oxycodone Hydrochloride pills. BCI testing later confirmed that each tablet was positive for 0.1 grams of Oxycodone.

Count Three

On February 20, 2013, the same confidential source purchased ten (10) fentanyl patches from Cobb for two hundred and fifty dollars (\$250.00). The source and Cobb agreed to meet at the same location from the second transaction.

The source was searched at a staging area, fitted with a recording/transmitting device and provided with the buy money. Agent Stout and the source then drove to Cobb's house where Cobb again approached the passenger side window. Cobb handed Agent Stout ten (10) clear liquid filled patches and explained that she would be getting another box of fentanyl patches soon. Each box contains ten (10) patches. Agent Stout handed Cobb the buy money and asked if the price would be the same next time. Cobb replied affirmatively and departed the car window to head back inside.

Agent Stout and the source returned to the staging area and the source was again searched. BCI testing found that the patches marked "Fentanyl TS 25 mcg/h" each tested positive for 0.7 grams of Fentanyl.

As part of preparing the pre-sentence investigation report, the probation department interviewed Cobb. Cobb admitted that she stole her brother-in-law's prescription for Oxycodone and a box of Fentanyl patches a week or so prior to December 27, 2012. Cobb's version gives the name of the confidential source, who asked if he could buy prescription drugs from Cobb.

Cobb admitted to the transactions and was arrested in mid June. When asked why she committed the offenses, Cobb replied that it was for the money. Cobb contends that she was unemployed because of her medical needs. As Cobb admitted in the PSI, however, Cobb was employed at the time of the offenses.

The Medina County Grand Jury returned an indictment charging Sabrina M. Cobb on May 23, 2013 with three (3) counts: two (2) counts of aggravated trafficking in drugs (Oxycodone, a schedule II controlled substance) in violation of R.C. 2925.03(A)(1) and R.C. 2925.03(C)(1)(a), felonies of the fourth degree; and one (1) count of aggravated trafficking in drugs (Fentanyl, a schedule II controlled substance) in violation of R.C. 2925.03(A)(1) and R.C. 2925.03(C)(1)(c), a felony of the third degree. A warrant was issued for her arrest.

Cobb was arrested on June 11, 2013 and pleaded not guilty to the offenses. After the State provided discovery, Cobb eventually changed her pleas to “no contest” on September 16, 2013. The trial court referred the matter for a presentence investigation report and set sentencing for October 28, 2013.

At sentencing, the trial court reviewed the presentence investigation report and heard statements from Cobb’s counsel and Cobb herself. Clearly not believing her explanations for why she committed these offenses, the trial court imposed concurrent twelve (12) month prison sentences for each offense. The trial court also notified Cobb of postrelease control and waived fines and costs. The trial court journalized its sentence on November 1, 2013.

Cobb filed notice of appeal on November 5, 2013. Cobb subsequently moved to stay the trial court’s sentence pending appeal. The trial court granted that motion on November 13, 2013 and placed Cobb on a personal recognizance bond at the call of the court while the appeal is pending. The Ninth District Court of Appeals affirmed Cobb’s conviction and sentence on August 19, 2014. Cobb remains free on bond while this Court determines whether to accept jurisdiction.

Cobb filed notice of appeal and a memorandum in support of jurisdiction on October 2, 2014. The State of Ohio hereby responds in opposition, respectfully urging the Court to decline jurisdiction and dismiss the instant appeal.

LAW AND ARGUMENT

- I. Before imposing a prison sentence upon a defendant with a verified life-threatening medical condition, who may be eligible for community control, a trial court must consider whether the medical needs of the defendant can be met in the prison system. If the defendant's medical needs cannot be met in the prison system, then the trial court must impose a lesser sentence of community control which would allow the defendant to continue to receive life-saving medical treatment.

Under R.C. 2953.08(G)(2), the General Assembly was quite clear that the standard of review in felony sentencing cases is no longer "abuse of discretion." Instead, the appellate court is only permitted to increase, reduce, otherwise modify a sentence if it "clearly and convincingly finds" either that the record does not support the trial court's findings under enumerated sections or the sentence is contrary to law. As Justice Lanzinger recently noted in *State v. Belew*, 140 Ohio St. 3d 221, 2014-Ohio-2964, at ¶ 12 (Lanzinger, J. & O'Connor, C.J., dissenting from dismissal of appeal as improvidently accepted), "R.C. 2953.08(G)(2) repudiates the abuse of discretion standard in favor of appellate review that upholds the sentence unless the court of appeals clearly and convincingly finds the record does not support the trial court's findings." Here, there is simply nothing in the record to contradict the trial court's determination that a prison sentence was appropriate. The trial court was aware of Cobb's medical needs and considered them along with the all of the other information contained in a lengthy pre-sentence investigation report (PSI). The trial court determined that the manner in which Cobb committed her offenses, her continuing recreational use of marijuana even while treating her medical needs,

and her complete lack of remorse in this case counseled against community control and further supported the presumption in favor of a prison sentence.

There was a presumption in favor of prison under R.C. 2925.03(C)(1)(c). That section provides:

(C) Whoever violates division A of this section is guilty of one of the following:

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

...

- (c) Except as otherwise provided in this division, **if the amount of drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and,** except as otherwise provided in this division, **there is a presumption for a prison term** for the offense.

...

R.C. 2925.03(C)(1)(c) (emphasis added).

Count III of the indictment charged trafficking in fentanyl, which is a schedule II drug. R.C. 3719.41(B)(9). Cobb pleaded no contest to the charge, which specified that Cobb sold an amount of fentanyl equal to or exceeding the bulk amount. Even though a prison sentence was not *mandatory* in Cobb's case, there was a *presumption in favor of prison* under R.C. 2925.03(C)(1)(c).

Against this presumption in favor of a prison sentence, Cobb contends that the trial court failed to adequately consider the principles and purposes of sentencing and the seriousness and recidivism factors under R.C. 2929.11 and R.C. 2929.12. The trial court noted at the sentencing

hearing that it had reviewed the case, including the pre-sentence investigation report which is part of the record on appeal, and then heard statements from Cobb's counsel and Cobb herself.

Cobb's explanation at sentencing for her offenses was that she was unemployed as a result of her medical conditions and stole the drugs from her brother-in-law so that she could sell them to support herself. (Tr. at 31.) The trial court found that explanation incredible. (Tr. at 31.) The trial court noted that they had placed Cobb in the Substance Abuse Monitoring (SAM) program to make sure she was not using. (Tr. at 32.) SAM program evaluations showed that Cobb was still using marijuana during the pendency of this case.

The trial court also noted that the facts of these offenses showed that Cobb was familiar with and knew the price of drugs. (Tr. at 33-34.) Cobb participated in the transaction and negotiated the price for the drugs in a sophisticated way. (Tr. at 34.) Cobb knew how to deliver the drugs and successfully negotiated a high price for them. (Tr. at 34.) Cobb sold fifty (50) pills of Oxycodone for three hundred to four hundred (300-400) dollars. (Tr. at 34.) And she sold ten (10) fentanyl patches for twenty-five (25) dollars each. (Tr. at 34.) As the trial court noted, Cobb's familiarity with the prices and process indicate that Cobb has done this before.

In engaging Cobb on the record at sentencing, the trial court was clearly dissatisfied with her answers to several questions. Cobb attempted to explain away why she stole drugs from her brother-in-law and sold them for money. When the trial court questioned her about her seeming lack of acceptance of responsibility, Cobb said she was "own[ing] it." (Tr. at 36.) Her answers to the trial court's questions, however, did not appear to the trial court actually to accept responsibility. (Tr. at 36-37.)

Against the admittedly extensive drug history and the fact that she stole from her own family to acquire drugs, which she in turn sold for money to finance acquisition of different

drugs, Cobb told the probation department that she did not have a drug problem. (Tr. at 37-38.) Then when asked about the high creatinine levels in urinalysis tests while on the SAM program, Cobb tried to use her medical condition as an excuse for a “couple days” of tests. (Tr. at 39.) Cobb’s creatinine levels were out of range in tests conducted on June 17, June 21 and July 26, 2013. (PSI at 1.) In between the June 21 and July 26 tests, however, Cobb’s tests were confirmed positive for marijuana on July 11, 2013 and an initial positive for marijuana on July 23, 2013. (PSI at 1.)

The trial court noted that Cobb was not selling drugs to support herself. (Tr. at 39-40.) Instead, the trial court noted, Cobb was stealing drugs so that she could sell them in order for her to get money to buy different drugs. (Tr. at 40.) Cobb attempted to claim that she wasn’t buying drugs with the money she made from selling her brother-in-law’s prescriptions, but the trial court indicated that he did not believe her. (Tr. at 41.) Thus, while Cobb claims that she expressed remorse and accepted responsibility for her offenses, the trial court did not believe her sincerity in making these representations at sentencing. (Tr. at 39-41.)

As the Ninth District noted in *State v. Johnson*, 9th Dist. Summit No. 26788, 2013 Ohio 4680, at ¶ 10, a trial court retains the prerogative to make determinations on the credibility of a statement of remorse. Such a determination weighs on the recidivism factors in R.C. 2929.12(D)(5) and R.C. 2929.12(E)(5) that the defendant show “genuine” remorse for the offense. See *State v. Smith*, 9th Dist. Summit No. 26585, 2013 Ohio 4682, at ¶ 26 (“it is important to note that R.C. 2929.12(E)(5) requires an offender express “*genuine* remorse.”) (emphasis in original).

Cobb contends, and the State does not dispute, that she has serious medical issues. These medical issues, however, were addressed in significant detail in the PSI. Page five (5) of the ten

(10) page report has a section entitled “Mental/Physical Health,” in which the probation department noted in bolded text that Cobb was diagnosed with Lupus in 2011 and anemia in 2012. The PSI also notes that Cobb receives blood transfusions every two to three (2-3) weeks and that she has been diagnosed with profound non-immune hemolytic anemia.

The PSI indicates on that same page that Cobb denied having a drinking or a drug problem. PSI at 5. The report notes, however, that Cobb admitted to using marijuana starting at age 13 and then using marijuana daily from age 18 through 21 and once or twice per week after she was charged in this case.

Urinalysis testing in this case showed that Cobb had creatinine levels out of range in tests conducted on June 17, 2013, June 21, 2013, and July 26, 2013. As the trial court noted at the sentencing hearing, creatinine levels out of range means that there was a great use of water and other substances in order to have a test which is not accurate. (Tr. at 26.) Cobb was unable to submit to testing ordered on June 28, 2013 because she was in the hospital. Testing on July 11, 2013 and July 23, 2013, however, were each positive for marijuana.

On appeal, Cobb contends that she should not have been given a prison sentence for her three (3) separate drug sales resulting in convictions on two (2) felonies of the fourth degree and a felony of the third degree. Her argument to this Court is that her serious medical issues – which did not prevent her from committing the offenses and which did not stop her from smoking marijuana recreationally – should act to prevent the trial court from sentencing her to prison.

Cobb contends that the trial court failed to consider appropriately her medical issues before imposing a prison term. As the court of appeals noted, Cobb suffers from lupus, non-immune hemolytic anemia, and possible bone marrow failure. *State v. Cobb*, 9th Dist. Medina

No. 13CA0087-M, 2014 Ohio 3530, at ¶ 18. As a result, Cobb requires frequent blood transfusions. “When Cobb initially informed the trial court of her health problems, the trial court did not ignore the issue but expressed concern regarding the impact her continued drug use might have on those medical conditions.” *Id.* “At the sentencing hearing, the trial court again addressed her medical conditions stating that it was not a reason to “give her a pass.” *Id.*

The Ninth District noted that even when a defendant suffers from serious medical issues a lesser, non-prison, sentence is *not* required if the defendant’s medical needs can be met in the prison system. *Id.*, citing *State v. Suarez*, 11th Dist. Geauga No. 2013-G-3167, 2014 Ohio 1350, at ¶ 18 and *State v. Martin*, 12th Dist. Butler No. CA2013-03-055, 2013 Ohio 3676, at ¶25.

In *State v. O’Shannon*, 44 Ohio App. 3d 197, 200-201, 542 N.E.2d 693 (10th Dist. 1988), *Suarez*, and *Martin*, the court of appeals in each case (the 10th, 11th, and 12th Districts, respectively) have each held that prison sentences for those with serious medical needs are not per se illegal or an abuse of the trial court’s discretion. Rather, it falls to the defendant to show that the state prison system is incapable of handling the defendant’s medical needs. *Id.*; compare *State v. Carlisle*, 131 Ohio St. 3d 127, 2011 Ohio 6553, at ¶ 4 (noting that Carlisle’s medical needs, including kidney dialysis three (3) times per week, although expensive, were capable of being met in the state prison system).

Cobb contends on appeal that the trial court erred in not finding that the prison system could meet her medical needs, but this argument assumes facts never presented to the trial court. There was no argument at the sentencing hearing that the prison system was incapable of satisfying Cobb’s medical needs. Therefore there was no issue before the trial court requiring it to find that the prison system was in fact capable of handling Cobb’s medical needs.

To require the trial court to make such a finding not only contravenes this Court's previous decision in *State v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio 856, at paragraph seven of the syllabus, but requires trial courts to be omniscient. Faced with a dearth of evidence or even an argument at the sentencing hearing that the state prison system was incapable of handling Cobb's medical needs, Cobb contends on appeal that the trial court erred in imposing a prison sentence. The trial court could have resolved that issue were it presented timely – but it was not.

Counsel presented no evidence or argument that the state prison system could not handle inmates with medical needs – likely because the Department of Rehabilitation and Correction (ODRC) routinely does so. In fact, according to ODRC's website, the Franklin Medical Center in Columbus, which houses female inmates as well as male inmates, has at least three (3) medical units devoted to inmates with medical needs including a unit solely dedicated to patients with “significant long-term medical needs” ODRC, FRANKLIN MEDICAL CENTER <http://www.drc.ohio.gov/Public/fmc.htm> (section titled “Unique Programs” under “Three Medical Units”) (last accessed October 20, 2014).

There was no evidence at the sentencing hearing that ODRC was incapable of handling Cobb's medical needs and all of the available evidence suggests that ODRC is more than capable of handling Cobb's medical issues. If ODRC can handle kidney dialysis three (3) times a week for approximately two (2) years, *Carlisle*, 131 Ohio St. 3d 127, at ¶ 2 (three year prison sentence with less than 300 days jail credit), ODRC can handle blood transfusions every 2-3 weeks and other care which did not interfere with either Cobb's ability to commit these offenses or her recreational use of marijuana. It also did not interfere with Cobb's lack of remorse or her attempt to hide behind her medical conditions as an excuse for her positive tests for marijuana.

Ultimately, this case does not involve a substantial constitutional question or a matter of great general or public interest. Exercise of the Court's jurisdiction would not further any statewide understanding of the law or provide needed answers on emerging issues. Accepting this case would only help one individual – Ms. Cobb herself – to further avoid the consequences of her admitted drug trafficking.

CONCLUSION

For all of the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court decline jurisdiction over the instant discretionary appeal.

Respectfully submitted,


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PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of the State of Ohio was sent regular U.S. mail to Joseph F. Salzgeber, Counsel for Cobb, P.O. Box 799, Brunswick, Ohio 44212-0799, this 28th day of October, 2014.


MATTHEW A. KERN
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