

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09 CA 104
DANITA SWICK	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 2008 CR 801

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 13, 2010

APPEARANCES:

For Defendant-Appellant:

DAVID A. SAMS  
P.O. Box 40  
West Jefferson, OH 43162

For Plaintiff-Appellee:

KENNETH W. OSWALT  
LICKING COUNTY PROSECUTOR

CHRISTOPHER A. REAMER  
20 S. Second St., 4<sup>th</sup> Floor  
Newark, OH 43055

*Delaney, J.*

{¶1} Defendant-Appellant, Danita Swick, appeals her conviction and sentence for one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs (Methamphetamine), in violation of R.C. 2925.041(A)(C)(1), a felony of the third degree. Plaintiff-Appellee is the State of Ohio.

### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} On December 18, 2008, Appellant was indicted by the Licking County Grand Jury on one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs (Methamphetamine). The charge arose from a search warrant executed on Appellant's residence on December 12, 2008 by detectives with the Central Ohio Drug Enforcement Task Force. Upon execution of the search warrant, detectives found multiple items inside the residence consistent with the manufacture of methamphetamine. The detectives interviewed Appellant regarding her involvement in the methamphetamine cook. Appellant admitted that she was aware that her husband, Rick Swick, was cooking methamphetamine in the home. Appellant further admitted that she made multiple purchases of pseudoephedrine for the purposes of manufacturing methamphetamine in her home.

{¶3} Appellant's husband was indicted on one count of Illegal Manufacture of Drugs (Methamphetamine) and one count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs (Methamphetamine). Appellant's husband entered a no contest plea and was sentenced to a mandatory three-year prison term.

{¶4} The execution of the search warrant also resulted in the indictment of Randa K. Baker for the Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs (Methamphetamine).

{¶5} Appellant initially entered a plea of not guilty to her charge, but on April 28, 2009, counsel for Appellant notified the trial court that Appellant would be entering a change of plea and waiving her right to trial.

{¶6} The case was set for a change of plea and sentencing hearing but the matter was continued upon Appellant filing a sentencing memorandum. A conviction under R.C. 2925.041(A)(C)(1) requires a minimum mandatory prison term of two years. Appellant argued in her sentencing memorandum that her right to equal protection under the laws was violated by the imposition of a mandatory two-year prison term when Ms. Baker received a sentence of community control due to the State amending the Ms. Baker's indictment. Appellant argued Ms. Baker was indicted under the same offense because she engaged in the identical criminal activity as Appellant, but the State amended Ms. Baker's indictment to delete the reference to "methamphetamine." As a result, Ms. Baker was eligible for community control sanctions. Appellant argued there was no rational basis for the disparity in treatment between the two because the Ms. Baker had a prior felony record and had violated her bond conditions. Appellant argued that she had no prior record, had complied with her bond conditions, and was engaged in a recovery program.

{¶7} The trial court held the change of plea and sentencing hearing on July 14, 2009. The trial court heard arguments as to sentencing and denied Appellant's

argument for a sentence of community control. By judgment entry on July 14, 2009, the trial court imposed a mandatory two-year sentence.

{¶8} It is from this decision Appellant now appeals.

### **ASSIGNMENTS OF ERROR**

{¶9} Appellant raises two Assignments of Error:

{¶10} “I. THE DEFENDANT-APPELLANT’S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN SHE WAS NOT ADVISED THAT SHE WAS WAIVING HER CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

{¶11} “II. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF ARTICLE I, SECTION 1 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.”

#### **I.**

{¶12} Appellant claims in her first Assignment of Error the trial court erred in not informing her during her plea that she had the right to a unanimous jury verdict. We disagree.

{¶13} This issue was recently addressed by this Court in *State v. Phillips*, Muskingum App. No. CT2009-0002, 2009-Ohio-4521. We stated:

{¶14} “R.C. 2945.05 sets forth with particularity a defendant's right to waive jury trial and the language required to do so:

{¶15} “In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: ‘I \_\_\_\_\_, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.’

{¶16} “Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.’

{¶17} “There is no dispute that the statute was complied with in the case sub judice. This court has visited the unanimous jury issue in several cases, including *State v. Murphy*, Muskingum App. No. CT2008-0067, 2009-Ohio-2690, *State v. Wesaw*, Fairfield App. No. 08CA12, 2008-Ohio-5572, *State v. Smith*, Muskingum App. No. CT2007-0073, 2008-Ohio-3306, and *State v. McBraver*, Muskingum App. No. CT2008-0015, 2008-Ohio-4207, and has held the criminal rules and the revised code are satisfied by a written waiver of jury trial, signed by the defendant, made in open court, and filed with the court, after arraignment and an opportunity to consult with counsel.

{¶18} “The rulings by this court are consistent with the Supreme Court of Ohio's decisions in *State v. Ketterer*, 111 Ohio St.3d 70, 855 N.E.2d 48, 2006-Ohio-5283, *State v. Fitzpatrick*, 102 Ohio St.3d 321, 810 N.E.2d 927, 2004-Ohio-3167, *State v. Bays*, 87

Ohio St.3d 15, 716 N.E.2d 1126, 1999-Ohio-216, and *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464.” Id. at ¶6-10.

{¶19} Likewise, we find there is no argument that the trial court failed to comply with the statute in the present case. Upon the established authority cited above, we find no error.

{¶20} The first Assignment of Error is overruled.

## II.

{¶21} Appellant argues in her second Assignment of Error that her due process and equal protection rights were violated because Appellant was treated differently than Randa K. Baker based upon Appellant’s marital status. We disagree.

{¶22} Appellant filed a sentencing memorandum arguing her equal protection rights were violated when Appellant was treated differently than Ms. Baker in a companion case arising out of the same events. Ms. Baker was indicted for one count of Illegal Assembly of Chemicals for the Manufacture of Drugs (Methamphetamine) in Licking County Case No. 2008CR00803. The State subsequently amended the indictment to delete the reference to methamphetamine eliminating the mandatory minimum sentencing requirement of two years in prison. The trial court sentenced Ms. Baker to community control sanctions.

{¶23} Appellant’s sentencing memorandum stated there was no rational basis for the treating the two defendants, who were charged for the same offense under the same circumstances, differently because Ms. Baker had multiple factors against the imposition of community control sanctions.

{¶24} In Appellant's brief before this Court, Appellant argues that Appellant was treated differently because of her marital status. Appellant states that she was charged and sentenced more severely than Ms. Baker because Rick Swick is Appellant's husband. Mr. Swick was convicted and sentenced for the manufacturing of methamphetamine in the couple's home.

{¶25} As argued by the State, we find that Appellant did not raise a violation of her equal protection rights based upon her marital status before the trial court in her sentencing memorandum and she is therefore raising the argument for the first time on appeal. Accordingly, we will review the matter under the plain error doctrine. "Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 95, 372 N.E.2d 804. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *Id.* at 97, 372 N.E.2d 804.

{¶26} Upon a review of the record presented, we cannot find that but for Appellant's marital status to Mr. Swick, the outcome of Appellant's conviction and sentence would have been different. Pursuant to the State's amendment of Ms. Baker's indictment, Appellant and Ms. Baker were not charged and sentenced for the same offense. There is no evidence before this Court regarding the circumstances of the State's amendment of Ms. Baker's indictment.

{¶27} In this particular case, the trial court simply imposed the minimum mandatory prison term for the offense, so therefore it is not discriminatory.

{¶28} Accordingly, Appellant's second Assignment of Error is overruled.

{¶29} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Edwards, P.J. and

Wise, J. concur.

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HON. PATRICIA A. DELANEY

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE

PAD:kgb

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DANITA SWICK	:	
	:	
	:	Case No. 09 CA 104
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. JULIE A. EDWARDS

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HON. JOHN W. WISE