[Cite as *State v. Smith*, 2010-Ohio-2098.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93383

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAVELL H. SMITH

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
SENTENCE VACATED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No.CR-519965

BEFORE: Blackmon, J., Rocco, P.J., and Jones, J.

RELEASED: May 13, 2010
JOURNALIZED:

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Lavell H. Smith appeals his conviction and sentence. Smith assigns the following errors for our review:

> **"I. The trial court erred in denying Appellant's motion for acquittal as to the charge when the state failed to present sufficient evidence to sustain a conviction."**
>
> **"II. Appellant's conviction is against the manifest weight of the evidence."**
>
> **"III. Appellant is entitled to a de novo sentencing hearing as the court did not properly impose a specific term or period of post release control at the sentencing hearing."**

{¶ 2} Having reviewed the record and pertinent law, we affirm in part, vacate in part and remand to the trial court for resentencing. The apposite facts follow.

{¶ 3} On January 22, 2009, a Cuyahoga County Grand Jury indicted Smith on two counts of drug trafficking, with a school yard specification attached to one of the counts. On February 5, 2009, Smith pleaded not guilty at his arraignment. Thereafter, several pretrials were conducted, and on May 4, 2009, a jury trial commenced.

Jury Trial

{¶ 4} At trial, the state presented the testimony of four witnesses including Detective Ben Kreischer of the Euclid Police Department. Detective Kreischer testified that on July 1, 2008, a confidential informant

("CI") visited his office and indicated that she wanted to turn in her drug supplier because she wanted to overcome her drug addiction.

{¶ 5} The CI referred to her drug supplier as "Chuck Smith" and also by the nickname "Vel." Utilizing the police database, Detective Kreischer was able to determine that the CI's drug supplier's name was Lavell Smith. In addition, Detective Kreischer learned Smith's telephone number and almost an exact street address.

{¶ 6} The CI agreed to assist the police in effecting a controlled drug purchase from Smith. Detective Kreischer utilized the CI's cellular phone to telephone Smith at home. Detective Kreischer recorded the telephone conversation between the CI and Smith. During the recorded conversation, the CI stated she wanted to purchase "a hundred," which is street parlance for $100 worth of heroin. Smith agreed to come to the CI's home, in the city of Euclid, within 10 minutes with the drugs.

{¶ 7} After the sale was arranged, Detective Kreischer searched the CI and gave her a shirt that was fitted with an electronic monitoring device, which included a hidden camera in one of the buttons. Detective Kreischer then gave the CI $100 of prerecorded money to facilitate the transaction.

{¶ 8} Smith arrived between 4:40 p.m. and 4:45 p.m., walked onto the porch, and engaged in a hand-to-hand transaction with the CI. Detective Kreischer had an unobstructed view of the transaction while standing less

than 10 feet from the house's picture window. Detective Kreischer stated that the CI immediately reentered the house and handed him eight bags of suspected heroin.

{¶ 9} On July 11, 2008, a second controlled drug buy was arranged. The CI made another recorded telephone call to Smith's home in which she indicated that she wanted to purchase $125 worth of heroin. This time, the arrangement required the CI to travel to Smith's home, in the city of Cleveland, to effect the transaction.

{¶ 10} Detective Kreischer prerecorded $125 in buy money, picked up the CI, searched her, fitted her with the aforementioned recording device, and traveled to the location. Detective Kreischer drove to the location, dropped the CI off on the corner of Smith's street, and waited until the CI walked to Smith's home.

{¶ 11} Detective Kreischer watched as the CI walked up the street to Smith's house and engaged in another hand-to-hand transaction. The CI returned with 10 bags of suspected heroin.

{¶ 12} A warrant was issued for Smith's arrest and Smith subsequently turned himself in to the authorities.

{¶ 13} Detective Dave Carpenter of the Euclid Police Department testified that he participated in both controlled drug buys arranged in conjunction with the CI. Detective Carpenter stated that in the first

transaction, while conducting mobile surveillance, he observed Smith exit a vehicle in front of the CI's home, walk towards the house, and return a short time later.

{¶ 14} In the second transaction, Detective Carpenter provided visual surveillance of the transaction. Detective Carpenter watched as the CI walked up the driveway to Smith's door, and engaged in a hand-to-hand transaction. After the transaction was completed, Detective Carpenter watched the CI walk back to where she had exited Detective Kreischer's vehicle. Detective Carpenter never lost visual contact with the CI throughout the entire process.

{¶ 15} At trial, video footage of the two controlled drug buys were played without sound to the jury.

{¶ 16} The jury found Smith guilty of both counts of drug trafficking. The trial court sentenced Smith to prison terms of 18 months on both counts and ordered the sentences served consecutively. Smith now appeals.

Motion for Acquittal

{¶ 17} In the first assigned error, Smith argues the trial court erred when it denied his motion for acquittal because the state failed to present sufficient evidence to sustain the convictions. We disagree.

{¶ 18} Crim.R. 29(A), which governs motions for acquittal, states:

> **"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the**

> **entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."**

{¶ 19} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.**

{¶ 20} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)"

{¶ 21} After reviewing the evidence in a light most favorable to the state, we find that the evidence, if believed, could convince a rational trier of fact that the state had proven beyond a reasonable doubt each element of the charge of drug trafficking.

{¶ 22} At trial, the state presented the testimony of two detectives, who were intimately involved in effecting the two controlled drug buys in conjunction with a CI. The detectives testified about the preparation leading up to the drug buys, including, but not limited to, recording the telephone calls made to Smith, searching the CI to ascertain that she had nothing illegal on her person, and fitting her with a video device to record the transaction.

{¶ 23} The detectives testified that they kept the CI under constant surveillance and never lost sight of her. Detective Kreischer was able to observe the first transaction from behind the picture window of the CI's home. Detective Kreischer had an unobstructed view of the hand-to-hand exchange and that the CI reentered the home immediately with the suspected heroin and without the prerecorded buy money.

{¶ 24} Detective Carpenter testified that in the second transaction he maintained constant visual surveillance of the CI as she exited Detective

Kreischer's vehicle at the corner of Smith's street, walked to Smith's address, engaged in a hand-to-hand transaction, and walked directly back to Detective Kreischer. Detective Kreischer stated that after completing the second transaction, the CI handed over 10 bags of suspected heroin.

{¶ 25} In addition to the detectives' visual observation of the two transactions, the video device embedded in the CI's shirt button recorded the transactions. Said recording was played to the jury without sound. Further, Thomas Snezek, chief surveyor of the Cuyahoga County Engineer's Office, testified at trial. Snezek produced a map that showed that the first transaction, which took place at the CI's home, was within 1,000 feet of a school. Finally, Jeffrey Houser of the Ohio Bureau of Criminal Investigation testified that he analyzed the suspected heroin and determined that the substance contained in the packets was heroin.

{¶ 26} Based on the testimony of the detectives and the video recording of the transaction, we conclude there was sufficient evidence to sustain Smith's convictions for drug trafficking. Viewing the evidence in the light most favorable to the state, any rational trier of fact could have found that the state proved all of the essential elements of the instant charges beyond a reasonable doubt. Thus, the trial court properly denied Smith's motion for acquittal. Accordingly, we overrule the first assigned error.

Manifest Weight

{¶ 27} In the second assigned error, Smith argues his convictions are against the manifest weight of the evidence. We disagree.

{¶ 28} In *State v. Wilson,* 113 Ohio St.3d 382, 865 N.E.2d 1264, 2007-Ohio-2202, the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 29} As discussed in our resolution of the first assigned error, Smith's convictions were based on substantial and sufficient evidence. Two detectives testified that they observed the two transactions and a video device embedded in the CI's shirt button recorded the transactions.

{¶ 30} Nonetheless, Smith argues the jury lost its way because no money was found on Smith. We are not persuaded.

{¶ 31} At trial, detectives testified regarding Smith's assertions as follows:

> **"Q. Why not arrest Lavell Smith on July 1st or July 11th, 2008, Detective?**
>
> **"A. Contrary to what you've heard, controlled drug buys, two categories, the buy/bust and the buy/walk, buy/walk is more common than buy/bust. A buy/bust does take lots of manpower, overtime, and risk to the general population. You are dealing with narcotics detectives that are semi-marked. Some cases, hopefully, if you are doing a buy/bust, you are not in undercover clothes. The risk, what may happen, the risk that you take when you do a buy/bust is that you are not properly marked, the drug dealer believes it's just a ripoff, he doesn't know who is coming at him. And in many cases ended in disastrous consequences for the confidential informant, the suspect, and anybody who may be in that area. Usually when there's drugs, there's guns. There's a propensity for violence. And if you are trying to take that person down in a neighborhood, a residential neighborhood, it would just defy common sense. When in this particular case we knew the individual, we knew where he lived, we knew his phone number, we had him identified."** Tr. 329-330.

{¶ 32} Here, Detective Kreischer's explanation for not arresting Smith at the conclusion of the controlled drug buys is plausible. After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we find that the jury did not lose its way in finding Smith guilty of both counts of drug trafficking. Smith's convictions are not against the

manifest weight of the evidence. Accordingly, we overrule the second assigned error.

Postrelease Control

{¶ 33} In the third assigned error, Smith argues he is entitled to a de novo sentencing hearing because the trial court failed to notify him at the time of sentencing that he was subject to a specific period of postrelease control. The state conceded this assigned error.

{¶ 34} In *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, the Ohio Supreme Court held that "[w]hen a trial court fails to notify an offender that he may be subject to postrelease control at a sentencing hearing, * * * the sentence is void; the sentence must be vacated and the matter remanded to the trial court for resentencing." Id. at 97. The Court explained that at the resentencing hearing, "the trial court may not merely inform the offender of the imposition of postrelease control and automatically reimpose the original sentence. Rather, the effect of vacating the trial court's original sentence is to place the parties in the same place as if there has been no sentence." Id. at 96.

{¶ 35} Further, *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, paragraph two of the syllabus, mandates: "[f]or criminal sentences imposed on and after July 11, 2006, in which a trial court failed to

properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191."

{¶ 36} Accordingly, we sustain Smith's third assigned error, vacate his sentence, and remand the matter for the trial court to employ the "sentence-correction mechanism" of R.C. 2929.191. *State v. Munson*, Cuyahoga App. No. 93229, 2010-Ohio-1982.

Judgment of conviction affirmed; sentence vacated and case remanded for resentencing.

It is ordered that appellee and appellant share the 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 Court of Common Pleas to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR.