[Cite as *State v. Hess*, 2004-Ohio-7311.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon: W. Scott Gwin, P.J.
	:	Hon: Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon: John F. Boggins, J.
	:	
-vs-	:	
	:	Case No. 2003-CA-00098
TRICIA K. HESS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Fairfield County Court of Common Pleas, Case No. 2002-CR-0404
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 8, 2004

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
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[Cite as *State v. Hess*, 2004-Ohio-7311.]

Gwin, P.J.

{¶1} Defendant-appellant Tricia K. Hess appeals from her convictions and sentences in the Fairfield County Court of Common Pleas on one count of aggravated trafficking in drugs in violation of R.C. 2925.03, a felony of the second degree, one count of trafficking in drugs in violation of R.C. 2925.03, a felony of the second degree, one count of trafficking in drugs in violation of R.C. 2925.03, a felony of the third degree, one count of trafficking in drugs in violation of R.C. 2925.03, a felony of the second degree, and four counts of theft of drugs, in violation of R.C. 2913.02, felonies of the fourth degree. The plaintiff-appellee is the State of Ohio.

{¶2} On December 20, 2002, appellant was indicted on eight felony counts relating to drug theft, drug possession, and drug trafficking. On January 10, 2003, appellant entered pleas of not guilty to each count contained in the indictment. On January 31, 2003, a motion to suppress evidence was filed on behalf of the appellant. An evidentiary hearing on the motion to suppress was held on March 12, 2003. The following evidence was adduced at that hearing.

{¶3} Appellant was employed as pharmacy technician at Big Bear Pharmacy. Sometime in early March of 2002, Agent William Padgett, was contacted by the pharmacy of the store concerning the appellant. Agent Padgett was employed by the Ohio Board of Pharmacy as a compliance agent. His role was to investigate alleged drug offenses committed by pharmacy personnel. Agent Padgett did not have the power to arrest suspected individuals.

{¶4} Around this time, the pharmacist at Big Bear Pharmacy noticed an empty 160 milligram bottle of Oxycontin that was on one of the shelves even though none of the pharmacists had prescribed this type of medication.

{¶5} Appellant had been suspended from work on February 27, 2002. The Agent Padgett and his partner met with two pharmacists of the Big Bear Pharmacy. They talked with the two pharmacists about strange behavior that the appellant had been exhibiting. Appellant had been falling asleep during her lunch hour, having slurred speech, and other difficulties. The agents arranged to interview the appellant. The appellant was contacted by telephone and requested to come to the store on March 5. Appellant's husband accompanied her to the store. Appellant was aware of prior to arriving at the store on the day in question the reason she was asked to come in was, because the bottle of Oxycontin was missing.

{¶6} Appellant was taken to the store's office. This area was described as a "two-room *** manager's office". Appellant first spoke for a couple of minutes with the Loss Prevention Officer. After appellant denied any involvement, that officer left the office. Agent Padgett and his partner identified themselves as investigators for the Ohio State Board of Pharmacy. They informed the appellant that they were investigating criminal activity at the Big Bear Pharmacy.

{¶7} Initially, appellant denied any involvement in illegal activity. Appellant asked the officers if she could have time to consider what to do. The officer ceased the interview for approximately ten minutes, while appellant thought about what to do. After this period of time, appellant broke the silence by asking "If I cooperate, will it help me?" Agent Padget asked appellant what she meant by that. Appellant then explained that

she had a relative that had been charged criminally in Fairfield County for drug trafficking and that he had cooperated with the police and in return for his cooperation, through the Prosecutor's office, there was a plea agreement. Agent Padgett informed the appellant that if she cooperated he would make it known in his report. Subsequently, appellant admitted to stealing between 150,000 to 200,000 doses of controlled substances from Big Bear Pharmacy over an eight month period. Those substances were sold to a third party.

{¶8} Appellant testified that she asked if she needed an attorney prior to making the statements to the agents. Agent Padgett had no recollection of the specific request, but admitted that she may have asked if she should have an attorney. Appellant further maintained that she asked to leave the room to speak to her husband, but was denied permission by the agents.

{¶9} By judgment entry filed June 9, 2003, the trial court overruled the appellant's motion to suppress. The trial court found that Agent Padgett never told the appellant she was under arrest, and he told her that she was free to go. Appellant was never arrested on March 5, 2002. The trial court found that appellant was not advised of her Miranda rights because she was not told she was under arrest. The court found that the appellant was an intelligent adult woman. The investigation was relatively short, conducted at low intensity without physical deprivation or mistreatment. The court found that there was no inducement or threat that made the statement involuntary.

{¶10} On August 12, 2003, appellant appeared in the trial court and entered pleas of no-contest to each of the eight counts contained in the indictment. A sentencing hearing was conducted by the trial court on October 6, 2003. At that hearing

the trial court heard testimony from appellant's mother, appellant's sister, and the appellant herself.

{¶11} The court sentenced appellant to two years in prison on counts one, two, three and four of the indictment, and twelve months each on counts five, six, seven and eight of the indictment. The court then ordered the time imposed on counts two and three, felonies of the second degree, to run concurrent with each other, but consecutive to the other sentences imposed, and that all the remaining counts run consecutively to one another. The sentences imposed on counts five, six, seven and eight were to be suspended and the appellant placed under a term of community controlled sanctions upon her release from prison. In total, appellant was sentenced to an aggregate of ten years incarceration, with four years suspended, and six years to be served in prison. Appellant timely appealed her conviction raising the following two assignments of errors:

{¶12} "I. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

{¶13} "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN SENTENCING THE DEFENDANT-APPELLANT TO CONSECTIVE [SIC] TERMS OF INCARCERATION."

I.

{¶14} In her first assignment of error, appellant maintains that the trial court erred by overruling her motion to suppress her oral and written statement to the agents of the State Board of Pharmacy. We disagree.

{¶15} There are three methods of challenging on appeal the trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact.

In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St. 3d 19, 437 N.E. 2d 583; *State v. Klein* (1981), 73 Ohio App. 3d 486, 597 N.E. 2d 1141*; State v. Guysinger* (1993), 86 Ohio App. 3d 592, 621 N.E. 2d 726.

{¶16} Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App. 3d 37, 619 N.E. 2d 1141, overruled on other grounds.

{¶17} Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95 Ohio App. 3d 93, 641 N.E. 2d 1172; *State v. Claytor* (1993), 85 Ohio App. 3d 623, 620 N.E. 2d 906.

{¶18} Appellant maintains that her statements, oral and written, were obtained from her as the result of custodial interrogation and should be suppressed due to the failure to administer the so-called Miranda warnings prior to the start of the interrogation.

{¶19} In *Yarborough v. Alvarado* (2004), 124 S.Ct. 2140, 158 L.Ed.2d 938, the United States Supreme Court reiterated the following test to determine "custody" for *Miranda* purposes:

{¶20} "Finally, in *Thompson v. Keohane,* 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), the Court offered the following description of the Miranda custody test:

{¶21} 'Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' 516 U.S., at 112, 116 S.Ct. 457 (internal quotation marks omitted). Id. at 2140.

{¶22} In the case at bar, the trial court determined that "Agent Padgett is a government official, and thus a state actor for Fourth Amendment purposes…" (Memorandum Decision filed June 9, 2003 at 3). Although the State argues in response to the appellant's brief that this finding is not correct, the State has not filed a cross-appeal challenging this finding by the trial court. Accordingly, the sole issue is whether the appellant's statements were the product of custodial interrogation.

{¶23} The following factors weigh against a finding that appellant was in custody. Appellant appeared at the store on March 5th voluntarily. (ST. at 65-66). There is no suggestion in the record that appellant was threatened if she did not appear. Appellant was aware prior to agreeing to come to the store of the nature of the meeting:

{¶24} "[Q]. What was your understanding as to the reason you were asked to come to the store on March the 5th?

{¶25} "[A.] The understanding was that the bottle of Oxycontin had been missing. I was told by [the pharmacist in charge] on February 27th that the bottle was missing and that either I took it or the inventory person took it". (Id. at 67).

{¶26} Appellant's husband accompanied her to the store on March 5th and remained in the store throughout the interview. (Id. at 66-67). When appellant asked the agents if she could have time to think about what to do, the agents ceased the interview for nearly ten minutes. (Id. at 76). The interview took place in the store's office, which appellant described as a "two-room…manager's office" (Id. at 69). Appellant first spoke for "a couple of minutes" with a loss prevention officer. (Id. at 68). After appellant denied any involvement that officer "left the office." (Id.). Appellant was seated in the doorway of the office which remained opened. (Id. at 84). At the end of the interview, the agents met with appellant and her husband and discussed "everything that had occurred and what she was wanting [sic] to do…" (Id. at 23-24). Appellant was allowed to go home that day. (Id.).

{¶27} Other facts point in the opposite direction. Appellant testified that she was not permitted to speak with her husband. (Id. at 35-36; 75). Appellant was never told she was free to leave at any time during the interview.

{¶28} "A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty* (1984), 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317, 336.

{¶29} In *State v. Brown* (2003), 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, the Ohio Supreme Court noted "[i]t is well established that at a suppression hearing, 'the evaluation of evidence and the credibility of witnesses are issues for the trier of fact.' *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 1 OBR 57, 437 N.E.2d 583. The trial court was free to find the officers' testimony more credible than appellant's. We therefore defer to the trial court's ruling regarding the weight and credibility of witnesses. *State v. Moore* (1998), 81 Ohio St.3d 22, 31, 689 N.E.2d 1." Id. at 55, 2003-Ohio-5059 at ¶15, 796 N.E.2d at 512.

{¶30} We conclude that a reasonable person in appellant's position during the interview would have understood that she was free to walk away from the questioning by the agents and leave. *State v. Mason* (1998), 82 Ohio St.3d 144, 153-154, 694 N.E.2d 932, 1998-Ohio-370.

{¶31} The mere fact that appellant confessed to the crime during the interview, leading to her eventual arrest, does not convert a non-custodial interview into one which is custodial. *Id.; Oregon v. Mathiason* (1977), 429 U.S. 495. Appellant was not in custody during her interview with the agents, and therefore they did not violate her rights by failing to give her *Miranda* warnings before questioning. *Mason, supra.*

{¶32} Based on the foregoing, we find that the trial court did not err in failing to suppress appellant's oral or written confession. We overrule appellant's first assignment of error.

II.

{¶33} In her second assignment of error, appellant argues the trial court should not have sentenced appellant to consecutive sentences for each of the three counts involving trafficking in drugs, i.e. counts one, two and four of the indictment.

{¶34} After the enactment of Senate Bill 2 in 1996, an appellate court's review of an appeal from a felony sentence was modified. Pursuant to present R.C. 2953.08(G)(2): "The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for re-sentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion.

{¶35} The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

{¶36} "(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant; "(b) That the sentence is otherwise contrary to law."

{¶37} Clear and convincing evidence is that evidence "which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶38} When reviewing a sentence imposed by the trial court, the applicable record to be examined by the appellate court includes the following: (1) the pre-sentence investigation report; (2) the trial court record in the case in which the sentence was imposed; and (3) any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed. R.C. 2953.08(F) (1) through (3). The sentence imposed, by the trial court, should be consistent with the overriding purposes of felony sentencing: “to protect the public from future crime by the offender” and “to punish the offender.”

{¶39} R.C. 2929.14 addresses consecutive sentencing guidelines. The statute permits consecutive prison terms if the court finds a consecutive sentence is necessary to protect the public from future crime or punish the offender, and that the consecutive sentencing is not disproportionate to the seriousness of the conduct and the danger the offender poses to the public. The court must also find either that the offender committed one or more of the multiple offenses while awaiting trial or sentencing, or while under post-release control; or at least two of the multiple offenses were part of a course of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual no one single term for any of the offenses committed adequately reflects the seriousness of the offender’s conduct; or the offender’s history of criminal conduct demonstrates the consecutive sentences are necessary to protect the public from future crime by the offender.

{¶40} In *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, the Supreme Court held a trial court is required to make its statutorily enumerated findings and give reasons supporting those findings at the sentencing hearing. The Supreme Court's opinion

indicates its holding is not limited to cases like Comer, but rather, applies generally to all sentencing.

{¶41} In the case at bar, appellant plead in exchange for a recommendation from the state, pursuant to Crim.R. 11(F), "that she serve a period of incarceration of a minimum of six years." (Plea. T., Aug. 12, 2003 at 4-5; Sent. T., October 6, 2003 at 4-5).

{¶42} Appellant was convicted of, among other charges, three (3) felonies of the second degree. Accordingly, appellant could have received a sentence of 2, 3, 4, 5, 6, 7 or 8 years on each count. R.C.2929.14 (A) (2). The court explained to appellant that the maximum sentence if she were convicted and sentenced consecutively on each of the eight counts of the indictment would result in a penalty of 35 years in a state penal institution. (Plea T., Aug. 12, 2003 at 10). The aggregate term of imprisonment that the court imposed upon appellant is six years. (Sent. T. at 40-42). This was accomplished via a combination of consecutive and concurrent sentences. (Id.).

{¶43} This is not a case where the aggregate sentence exceeds the maximum sentence that appellant could have received on any one count of the indictment. It is possible that appellant could have received a six year prison term on any one of the second degree felonies, which if run concurrently with the other counts, would result in the same term of incarceration. It further appears that the trial court followed the state's recommendations which were discussed as part of the Crim. R. 11(F) plea negotiations.

{¶44} The trial court had the benefit of a pre-sentence investigation report, sentencing memorandum from the appellant, and a motion to suppress hearing. (Sent.

T., October 6, 2003 at 40). The court further heard statements from appellant's mother, sister and the appellant herself. (Id.).

{¶45} At the sentencing hearing the trial court found that appellant had created a situation involving a large degree of harm to the community due to the number of drugs sold by the appellant. (Id. at 35; 42-43). The court further found that appellant violated a position of trust by using her position at the store and with the store employees to obtain the drugs. (Id. at 36). The trial court further found that appellant had deliberately engaged in illegal conduct over an extended period of time, rather than an impulsive isolated incident or set of incidents. (Id. at 37). Further appellant delayed for nearly one year after being charged to seek out treatment. (Id. at 37).

{¶46} Appellant concedes that the trial court made the requisite findings to support the imposition of consecutive sentences. Based upon the foregoing, and a through review of each transcript filed in appellant's case, we find the trial court did properly state the reasons for imposing consecutive sentences. The trial court did set forth findings sufficient under R.C. 2929.14 to justify the imposition of consecutive sentences.

{¶47} Appellant's second assignment of error is overruled.

{¶48} For the foregoing reasons, the judgment of the Fairfield County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J., and

Boggins, J., concur

Edwards, J., concurs

separately

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JUDGES

EDWARDS, J., CONCURRING OPINION

{¶50} I concur in the disposition of this case but write separately because I believe that the first sentence of paragraph 43 of the majority opinion includes a misstatement of the law. That sentence appears to refer to R.C. 2953.08(C) but states that "[t]his is not a case where the aggregate sentence exceeds the maximum sentence that appellant could have received on any one count of the indictment." However, R.C. 2953.08(C) actually concerns consecutive sentences that exceed the maximum sentence for the most serious offense of which the defendant was convicted.

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FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TRICIA K. HESS	:	
Defendant-Appellant	:	CASE NO. 2003-CA-00098

{¶49} For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Fairfield County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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JUDGES