[Cite as *State v. Pack*, 2009-Ohio-6960.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 09CA26
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
GIA RACHELLE PACK,	:	
	:	**Released 12/23/09**
Defendant-Appellant.	:	

APPEARANCES:

Richard H. Hedges, Athens, Ohio, for appellant.

C. David Warren, ATHENS COUNTY PROSECUTOR, and George J. Reitmeier, ATHENS COUNTY ASSISTANT PROSECUTOR, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Following a bench trial, the court found Gia Pack guilty of trafficking in cocaine and aggravated trafficking in drugs. Pack admitted to committing both offenses, but she argues that the trial court's verdict was against the manifest weight of the evidence because she proved the affirmative defense of entrapment. However, Pack failed to present any evidence that the criminal design for these offenses originated with a government agent or that a government agent implanted in her mind the disposition to commit the offenses. Thus the trial court properly concluded that Pack failed to establish the affirmative defense by a preponderance of the evidence.

I. Facts

{¶2} The Athens County Grand Jury indicted Mrs. Pack on one count of trafficking cocaine and one count of aggravated trafficking in drugs, i.e.

methylenedioxymethamphetamine or "ecstasy." The indictment alleged that both offenses were committed in the vicinity of a juvenile. After Mrs. Pack pled not guilty to the charges, the matter proceeded to a bench trial where Mrs. Pack admitted to making the sales but raised the affirmative defense of entrapment. Although several witnesses testified at length during the trial, only an abbreviated summary of the events is necessary at this point.

{¶3} A confidential informant ("CI") for the Major Crimes Task Force in Athens County made two controlled buys of drugs from Mrs. Pack, one of his neighbors in an apartment complex. The CI negotiated both buys with Justin Pack, the defendant's husband and a person the task force had purchased drugs from in the past. The first buy occurred on the evening of June 2, 2008. Because Mr. Pack was working, he called Mrs. Pack approximately two minutes before the CI arrived at their apartment and instructed her to sell the CI the cocaine. When the CI arrived, Mrs. Pack asked him if he knew where the cocaine was in the apartment. The CI asked her if it was in the "usual spot," and Mrs. Pack immediately went to the kitchen and retrieved the cocaine and her husband's scales from a tin. After one of them weighed the cocaine, the CI gave Mrs. Pack $600 in exchange for 14 grams of the drug. The Packs' two-year old son was present during the transaction.

{¶4} The second buy occurred on the evening of August 8, 2008. Again, Mr. Pack had to work and called Mrs. Pack prior to the CI's arrival. Mr. Pack told her to sell the CI ecstasy located in the pocket of one of Mr. Pack's pairs of pants. When the CI arrived, Mrs. Pack invited him into the bedroom while she retrieved the ecstasy. She counted the tablets and gave the CI ten tablets in exchange for $200. The Packs' son

and a second child Mrs. Pack was babysitting were present during the transaction.

{¶5} Mrs. Pack testified that she did not feel intimidated by the CI during these transactions. When asked why she followed Mr. Pack's instructions, Mrs. Pack responded, "'Cause I knew that [Mr. Pack] wanted the money and if I didn't he'd be mad when he got home and I'd have to deal with him. I didn't know if we'd get into a fight or if he'd hit me or you know." Mrs. Pack testified that in the past, Mr. Pack had thrown chairs at her, hit her, choked her, and threatened her with a knife. Kylee Hart, one of Mrs. Pack's friends, testified that she had seen Mrs. Pack with bruises and a split lip.

{¶6} The trial court rejected Mrs. Pack's entrapment defense and found her guilty on both counts of trafficking. After sentencing, Mrs. Pack filed this appeal.

II. Assignment of Error and Standard of Review

{¶7} Mrs. Pack assigns the following error for our review:

> The Court erroneously denied the affirmative defense of entrapment despite the weight of the evidence provided by Appellant in support of the affirmative defense and the State failed to prove that the defendant had a predisposition towards the criminal offense, an indispensible element needed to negate this affirmative defense.

{¶8} In her sole assignment of error, Mrs. Pack contends that her convictions were against the manifest weight of the evidence because she established the affirmative defense of entrapment by a preponderance of the evidence. "We will not reverse a trial court's decision as being against the manifest weight of the evidence if some competent, credible evidence supports it." *In re Jordan*, Pike App. No. 08CA773, 2008-Ohio-4385, at ¶9, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus. "In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire

record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Brown*, Athens App. No. 09CA3, 2009-Ohio-5390, at ¶24, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. However, we presume the trial court's findings are correct because it is "best able to view the witnesses and observe their demeanor, gestures, and voice inflections and to use those observations in weighing the credibility of the testimony." *Jordan* at ¶9, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 and *Jones v. Jones*, Athens App. 07CA25, 2008-Ohio-2476, at ¶18.

III. Entrapment

{¶9} By raising an entrapment defense, the defendant admits that she committed the offense but seeks to avoid criminal liability for her conduct. *State v. Doran* (1983), 5 Ohio St.3d 187, 193, 449 N.E.2d 1295. The Supreme Court of Ohio defines entrapment under a subjective test that focuses on the defendant's predisposition to commit an offense. Id. at 191. "[E]ntrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." Id. at paragraph one of the syllabus. The defense is available "when the government acts, under a prearranged agreement, through an 'active government informer,' whether paid or not." *State v. Klapka*, Lake App. No. 2003-L-044, 2004-Ohio-2921, at ¶29, citing *Sherman v. United States* (1958), 356 U.S. 369, 373-374, 78 S.Ct. 819, 2 L.Ed.2d 848. "However, entrapment is not established

when government officials 'merely afford opportunities or facilities for the commission of the offense' and it is shown that the accused was predisposed to commit the offense." *Doran* at 192, quoting *Sherman* at 372.

{¶10} Contrary to Mrs. Pack's assertion in her brief, the government does not have the burden to establish the defendant's predisposition to commit the offense. Because entrapment is an affirmative defense under former R.C. 2901.05(C)(2),[1] the defendant has the burden of going forward, as well as the burden of proving the defense by a preponderance of the evidence. Id. at paragraph two of the syllabus; R.C. 2901.05(A). Thus the defendant asserting an entrapment defense must adduce evidence supporting her lack of predisposition. *Doran* at 193. The Supreme Court of Ohio has found this requirement fair:

> The accused, as a participant in the commission of the crime, will be aware of the circumstances surrounding the crime, and is at no disadvantage in relaying to the fact-finder his version of the crime as well as the reasons he was not predisposed to commit the crime. Moreover, the accused will certainly be aware of his previous involvement in crimes of a similar nature which may tend to refute the accused's claim that he was not predisposed to commit the offense. In summary, none of the evidence which is likely to be produced on the issue of predisposition would be beyond the knowledge of the accused or his ability to produce such evidence.

Id.

{¶11} The record confirms that Mrs. Pack failed to carry her burden to establish the entrapment defense. First, Mrs. Pack failed to adduce any evidence that the criminal design in this case originated with a government agent. The task force purchased drugs from Mr. Pack in the past, and it is unclear from the trial testimony whether the CI or Mr. Pack initiated negotiations for the drug buys in this case.

[1] The Revised Code sections dealing with affirmative defenses was amended effective September 9, 2008 and the corresponding section now appears at R.C. 2901.05(D)(1).

Moreover, she presented no evidence demonstrating that the government implanted in her mind the disposition to sell cocaine or ecstasy. By Mrs. Pack's own testimony, prior to each transaction Mr. Pack called her, told her about the impending transaction, and instructed her to make the sale. Mrs. Pack testified that she made the sales because she feared the repercussions from her husband if she did not, and she testified about how Mr. Pack abused her in the past.[2] Thus, if we are to believe that anyone implanted in Mrs. Pack's mind the disposition to sell drugs, the evidence indicates that it was her own husband – not the CI. "[A] third party who acts to entrap, cannot be an agent of law enforcement officers unless he acts with knowledge of his agency." *State v. Jones*, Ross App. No. 1647, 1991 WL 13783, at *3. And no evidence indicates that Mr. Pack knew he was acting as an agent of law enforcement when he told Mrs. Pack to participate in these drug transactions.

{¶12} Mrs. Pack presented no evidence that the criminal design for the trafficking offenses originated with the government or that a government agent implanted in her mind the disposition to commit these offenses. Thus, the trial court's finding that she failed in her burden to prove entrapment was not against the manifest weight of the evidence. Accordingly, we overrule Mrs. Pack's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[2] Mrs. Pack apparently also raised the affirmative defense of duress during the trial, but she makes no argument concerning it here.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.