[Cite as *Toledo v. Warnka*, 2009-Ohio-2941.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo

Appellee

v.

Donna D. Warnka

Appellant

Court of Appeals No. L-08-1231

Trial Court No. CRB-06-22984

DECISION AND JUDGMENT

Decided: June 19, 2009

* * * * *

David Toska, Chief Prosecutor, for appellee.

Martin P. Dow, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from the judgment of the Toledo Municipal Court, which, following a trial to the bench on June 25, 2008, found appellant,

Donna Warnka, guilty of permitting drug abuse, a misdemeanor of the first degree, in violation of R.C. 2925.13(B). Appellant was sentenced to a suspended six month sentence and court costs.

{¶ 2} The following evidence was presented at trial. On November 9, 2006, at approximately 5:15 a.m., Toledo police officers executed a search warrant at 2907 117th Street, Toledo, Ohio. The premise targeted by the search warrant was a two story medium-sized home. When the police entered, appellant was seated on a couch on the first floor. Police officers proceeded upstairs to search the bedroom shared by Sierra Warnka, the adult daughter of appellant, and Kyle Schnatterly, Sierra's boyfriend. Detective Kevin Wiezbenski, who was previously acquainted with Schnatterly, was one of the officers searching the upstairs room. Schnatterly directed Wiezbenski to a small bag of cocaine concealed in the toe of a slipper. Sergeant Robert Marzec, another of the officers searching the room, discovered Sierra's insurance card among an unspecified amount of cocaine on the nightstand next to the bed. Marzec testified that it was possible to see the cocaine on the nightstand from the hallway at the top of the stairs. Weapons, scales and baggies were also discovered in the room.

{¶ 3} The officers who searched the first floor and basement found several glass marijuana pipes. A "Test Clear" urine tester was discovered in the dining room, which, according to Officer Jason Picking, is used to avoid testing positive for illegal substances. Scott Warnka, appellant's son, and Schnatterly were subsequently charged with drug

possession and drug trafficking. Based on these charges, appellant was charged with permitting drug abuse.

{¶ 4} On appeal, appellant raises the following assignments of error:

{¶ 5} First Assignment of Error:

{¶ 6} "The evidence presented at trial was insufficient to sustain a conviction for permitting drug abuse. The offense of permitting drug abuse requires that an occupant *knowingly permit* the premises to be used for the commission of a felony drug abuse offense. There was no evidence that Ms. Warnka *knew* of any *felony* drug abuse offenses occurring in her home; nor was there evidence that she *permitted* any *felony* drug abuse offenses in her home. Could any trier of fact have found that the elements of permitting drug abuse had been proven beyond a reasonable doubt?" (Emphasis in original.)

{¶ 7} Second Assignment of Error:

{¶ 8} "Ms. Warnka's conviction for permitting drug abuse was against the manifest weight of the evidence. The offense of permitting drug abuse requires that an occupant *knowingly permit* the premises to be used for the commission of a felony drug abuse offense. There was no evidence that Ms. Warnka *knew* of any *felony* drug abuse offenses occurring in her home; nor was there evidence that she *permitted* any *felony* drug abuse offenses in her home. In finding Ms. Warnka guilty, did the trier of fact lose its way and create a manifest miscarriage of justice?" (Emphasis in original.)

{¶ 9} In determining the sufficiency of the evidence, this court must determine if the evidence is, "legally sufficient to support all of the elements of the offense." *State v. Smith*, 6th Dist., No. WM-08-016, 2009-Ohio-2292, ¶ 23, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. The evidence must be such that it "would convince the average mind of the defendant's guilt beyond a reasonable doubt." Id., citing *Thompkins* at 390. The question 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶ 10} It is not the role of the appellate court to weigh the evidence. *State v. Olekshuk*, 11th Dist. No. 2004-A-0030, 2005-Ohio-5275, ¶ 16. Rather, as stated by the Ohio Supreme Court, "factual determinations are best left to those who see and hear what goes on in the courtroom." *State v. Cowans* (1999), 87 Ohio St.3d 68, 84. As such, in considering the sufficiency of the evidence, a reviewing court must not substitute its evaluation of the witnesses' credibility for that of the trier of facts. *State v. Benge* (1996), 75 Ohio St.3d 136, 143. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these

observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 11} R.C. 2925.13(B) states that, "[n]o person who is the owner, lessee, or occupant, or who has custody, control, or supervision, of premises or real estate, including vacant land, shall knowingly permit the premises or real estate, including vacant land, to be used for the commission of a felony drug abuse by another person." Appellees particularly rely upon the portion of the definition for knowingly which states,"[a] person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). Since a defendant in a criminal action is innocent until proven guilty, the city bears the burden of showing that appellant meets all the elements of the offense beyond a reasonable doubt. R.C. 2938.08.

{¶ 12} Several cases are illustrative of the process used to determine if mens rea has been proven beyond a reasonable doubt in cases involving a violation of R.C. 2925.13. In *State v. Ford,* (Apr. 9, 1986), 9th Dist. No. 3897, the court found that a woman knew her husband was committing felony drug abuse when she witnessed him making drug deals. The evidence in that case also showed she overheard someone ask her husband for cocaine, and that when the police arrived to search the residence, she obstructed them in order to give her husband time to flush the drugs. Id. The court stated that it was, "not a case where the 'circumstantial evidence is so attenuated that reasonable

minds would never find that the desired fact has been established beyond a reasonable doubt.'" Id., quoting *State v. Griffin* (1979), 13 Ohio App.3d 376, 377.

{¶ 13} Another such case is *State v. Dixon*, 3d Dist. No. 8-02-44, 2003-Ohio-2547, wherein a woman's stepson committed felony drug abuse in her home. The court determined there was sufficient evidence to prove the woman knew about the felony drug abuse because there was testimony showing the sale happened in her bedroom while she was watching. *Dixon* at ¶ 7.

{¶ 14} In a third case, a common pleas court ruled that a defendant who shared an apartment with her husband knew of his felony drug abuse because there was a white powdery substance located in numerous locations around their home. *State v. Wiley* (1987), 36 Ohio Misc.2d 20, 22. In articulating the factors it considered relevant, the court said:

{¶ 15} "The court is permitted to consider an inference that the defendant knew about the existence of drugs on the premises and because of the small size of the apartment, the quantity of drugs seized, the various locations where drugs were found, and the defendant's presence in the apartment when the seizure took place, the court is satisfied that circumstantial evidence proves the knowledge element beyond a reasonable doubt." Id.

{¶ 16} Both parties stipulate that Scott Warnka and Schnatterly were charged with felonies and that appellant was the owner, lessee, or occupant, or had custody, control, or

supervision, of the premises or real estate. The issue raised on appeal is whether appellant knowingly permitted felony drug abuse. Appellant asserts that the evidence provided by the city was not enough to establish proof beyond a reasonable doubt in light of the presumption of innocence. The city argues it met its burden because there was cocaine in plain sight and the home was littered with drug paraphernalia. Also, the city seems to argue that because appellant was employed in law enforcement at the time of the search, she would have been more aware of the drug abuse than a regular person. Essentially, the city's argument is that, using reasonable inferences, a rational trier of fact could find that appellant knew about the felony drug abuse in her home.

{¶ 17} Looking at the evidence in a light most favorable to the prosecution, we find the evidence was insufficient to support the claim that appellant knowingly permitted a felony drug abuse. While the city states this case is analogous to *Dixon*, the facts of that case are clearly distinguishable from those presented herein. In *Dixon*, there was evidence produced at trial showing that the defendant actually witnessed the predicate felony drug offenses which resulted in her conviction for permitting drug abuse. *Dixon,* 2003-Ohio-2547, ¶ 7. In this case, however, the city did not produce any equivalent evidence at trial.

{¶ 18} Although the city claims that *Dixon* is analogous because appellant saw evidence of drug paraphernalia around her house, we find that the presence of such items does not establish that appellant witnessed felony drug abuse. The only evidence of drug

use discovered in the common areas of the home were marijuana pipes and a urine cleansing tool. While this evidence might allow the court to infer that appellant knew there was marijuana drug abuse occurring in her home, we find that this evidence does not provide a reasonable basis for a rational trier of fact to infer that appellant knew of cocaine abuse in her home. This distinction is significant because marijuana abuse is a *misdemeanor* offense and, thus, would not provide a basis for establishing that appellant permitted a *felony* drug abuse.

{¶ 19} Also distinguishable from the facts in *Dixon*, the state never established that appellant witnessed any use or sale of cocaine. 3d Dist. No. 8-02-44, 2003-Ohio-2547, ¶ 7. In *Dixon*, a sale of drugs occurred while defendant was present in the same room. In this case, however, the police officers searching appellant's home only discovered the evidence of felony drug abuse in the room of appellant's daughter, Sierra, who was an adult woman cohabitating with her boyfriend. There was no evidence that appellant ever entered the room, despite the fact she was in control of the premises. Moreover, absent any evidence showing otherwise, and under the circumstances in this case, we find that it is unreasonable to infer that appellant would have entered the bedroom inhabited by her adult daughter and her daughter's boyfriend, or investigated the contents therein.

{¶ 20} The city also argues that because the cocaine discovered on the nightstand was visible from the hallway, appellant knew of its existence. The city, however, produced no evidence as to the length of time the cocaine was on the nightstand, and

provided no evidence that appellant was ever in a position to see the cocaine. As opposed to *Wiley*, where cocaine was found in various locations within the dwelling that were in the plain sight of the defendant, in this case, when the police entered appellant's home, appellant was seated on a couch on the first floor, out of plain sight of the cocaine. The city produced no evidence that appellant was upstairs in the hallway at a time when the cocaine was visible. Absent any proof, there is no basis to infer that appellant saw the cocaine on the nightstand next to the bed.

{¶ 21} The city further argues that, since appellant was a dispatcher for the sheriff's office, she must have had greater awareness that felony drug abuse was happening in her home. This appears to be an argument that, by virtue of appellant's duties as a dispatcher, she had some heightened awareness of possible felony drug abuse in her home. We find this argument without merit. The city provides no legal basis for making the claim that knowledge can be inferred more easily in criminal cases when a person has some role in law enforcement. Even if there were binding grounds for such a distinction, appellant was a dispatcher, not a member of a drug task force. There is no reason for her to be held to a greater standard than any other person.

{¶ 22} For the reasons set forth, we find that the city did not produce sufficient evidence to support a conviction of permitting felony drug abuse. Appellant's first assignment of error is therefore found well-taken.

{¶ 23} Since there was insufficient evidence to support a conviction, we do not need to consider appellant's second assignment of error that the trial court's finding was against the manifest weight of the evidence. Having determined appellant's second assignment of error is moot, it is found not well-taken.

{¶ 24} On consideration whereof, this court finds that the city did not produce enough evidence to sustain a conviction of permitting drug abuse. The judgment of the Toledo Municipal Court is therefore reversed and appellant's conviction is ordered vacated. This matter is remanded to the trial court for disposition in accordance with this court's decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE