

[Cite as *State v. Stephens*, 2010-Ohio-6165.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94520

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PAUL STEPHENS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518976

BEFORE: Celebrezze, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Paul Stephens, appeals his conviction for drug trafficking, arguing that insufficient evidence existed to support his conviction and his conviction was against the manifest weight of the evidence.¹ Based on our review of the lower court record and the relevant case law, we affirm.

¹Although this case is captioned *State of Ohio v. Paul Stephens*, the lower court record contains a journal entry amending appellant's name to his true name of Terrance Goldsborough. Because the parties continued to caption the case *State v. Stephens*, we will do the same.

{¶ 2} Appellant waived his right to a jury trial, and a bench trial commenced on November 10, 2009, where the state presented the testimony of only one witness, special agent Joseph Harper with the Drug Enforcement Administration (“DEA”). Harper testified that on October 3, 2007, he had a confidential informant arrange to purchase crack cocaine from appellant. The informant, as well as the vehicle he would be using, were thoroughly searched for contraband or anything else that would taint the controlled buy. The informant was then provided with prerecorded money to purchase the drugs.

{¶ 3} Harper and other agents set up a surveillance at the American Pride car wash in Cleveland, Ohio. At approximately 8:25 p.m., a white van appeared. Appellant emerged from the van’s passenger side and approached the informant’s vehicle. Appellant got into the informant’s vehicle for a few moments and then returned to the white van, which immediately pulled out of the parking lot. As the white van was leaving, it had to pass Harper, who was sitting in a nearby vehicle. As the van passed, Harper’s lights shone into the van and Harper was able to clearly identify appellant as the individual in the van’s passenger seat.

{¶ 4} Once the controlled buy was completed, Harper and other officers followed the informant to a secure location. Another search of the informant

revealed that he no longer had the prerecorded buy money, but he was in possession of crack cocaine.

{¶ 5} Appellant was indicted in a three-count indictment for two counts of drug trafficking and one count of possession of drugs, all of which carried major drug offender specifications. After the bench trial, appellant was found guilty of one count of drug trafficking in violation of R.C. 2925.03(A)(1), but was acquitted of all other charges and all major drug offender specifications. Appellant was sentenced to six years in prison. This appeal followed.

Law and Analysis

{¶ 6} Appellant argues that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. When deciding whether a conviction was based on sufficient evidence the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 7} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal. *Id.* at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated that “[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.* at 175.

{¶ 8} Appellant was convicted of drug trafficking in violation of R.C. 2925.03(A)(1), which prohibits an individual from selling or offering to sell a controlled substance. Appellant relies on this court's holding in *State v. Bullitt*, 166 Ohio App.3d 365, 2006-Ohio-2304, 850 N.E.2d 801, to argue that his conviction should be vacated. In *Bullitt*, the defendant was arrested after police, who were using binoculars to survey the area, saw the defendant engage in what

they believed was a drug transaction. Id. at ¶5. After apprehending the defendant and the other individual engaged in the transaction, the police found suspected drugs and contraband on the other individual, but found no drugs on the defendant. Id. at ¶6-8. The court in *Bullitt* vacated the defendant's conviction, noting that "there was no evidence as to any analysis of the purported cocaine or residue, if any, on the crack pipes. The only testimony offered by the state in an attempt to prove that a controlled substance was involved in this case was that the rock appeared to be crack cocaine and that the crack pipes were recovered from [the co-defendant]. That evidence is insufficient to prove that appellant sold, obtained, possessed, or used crack cocaine." Id. at ¶17.

{¶ 9} In this case, the police were not conducting a random survey of an area. Harper testified that a confidential informant arranged to meet appellant at a specific location and purchase crack cocaine. The informant and the vehicle he was using were thoroughly searched to ensure that no drugs or other contraband were present. After arriving at the location where the controlled buy was to take place, Harper observed appellant arrive, get into the informant's vehicle for a brief period, and then leave. After searching the informant's vehicle, Harper found what was later identified as crack cocaine.² This evidence,

²State's Exhibit 1 was a lab report showing that the substance was tested and was, in fact, crack cocaine. We note, however, that discovery of a controlled substance is unnecessary to support a drug trafficking conviction under R.C. 2925.03(A)(1). See *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, ¶9 ("Undoubtedly, a person can be convicted for offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without actually transferring a controlled substance to the buyer. * * * Therefore, there is no doubt that appellees'

although circumstantial, was sufficient to support appellant's conviction, and there were no discrepancies to warrant a finding that his conviction was against the manifest weight of the evidence.

Conclusion

{¶ 10} The evidence presented at trial, as summarized above, was sufficient to support appellant's conviction. The record reveals no discrepancies in the evidence, nor are there any other factors that would cause this court to question the validity of appellant's conviction. The trial judge did not lose his way nor did a manifest miscarriage of justice occur. Appellant's conviction was supported by sufficient evidence and was not against the manifest weight of the evidence.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 common pleas court to carry this judgment into execution. The defendant's

convictions can stand despite the fact that the substance offered as crack cocaine was actually baking soda."); *State v. Pimental*, Cuyahoga App. No. 84034, 2005-Ohio-384, ¶25 ("In 'offering to sell,' the proscribed conduct is the offer to sell, not the offering of a controlled substance. * * * An offer is the marketing stage of the entire criminal enterprise of commerce in controlled substances. * * * Therefore, the crime of offering to sell a controlled substance is committed when the offer is made, not when the transaction is consummated.").

conviction having been affirmed, any bail pending appeal is terminated.

Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR