[Cite as *State v. Hatton*, 2010-Ohio-5419.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MITCHELL R. HATTON

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 10CAA010012

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 09CRI060300
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 5, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Mitchell R. Hatton appeals from his conviction and sentence, in the Delaware County Court of Common Pleas, on one count of possession of hashish. The relevant facts leading to this appeal are as follows

{¶2} On February 4, 2009 the Westerville Police Department executed a search warrant at a residence on Northwest Street in Westerville. The officers were looking for evidence of the sale of marijuana and prescription pills by a relative of appellant at that location. During the execution of the search warrant, the officers searched appellant's bedroom and found several baggies with marijuana seeds and stems, drug paraphernalia, and a plastic baggie containing a dark sticky substance.

{¶3} Officer Doug Staysniak, who found the sticky substance, was unsure what it was, so he asked for assistance from the narcotics detectives who were with him at the scene. Detective Brian Schwartz could not immediately identify the substance. When Detective Schwartz questioned appellant about it, appellant told them that it was residue from his marijuana pipes.

{¶4} The officers bagged the substance and sent it to the Ohio Bureau of Criminal Identification and Investigation ("BCI"). BCI chemist Keith Taggart thereafter observed and ran tests on the substance, and concluded it was hashish.

{¶5} On June 5, 2009, the Delaware County Grand Jury returned a single-count Indictment against appellant, charging him with possession of hashish in violation of R.C. 2925.11(A), a felony of the fifth degree. On July 24, 2009, appellant appeared at arraignment and entered a not guilty plea.

{¶6} On December 15, 2009, appellant waived his right to a jury trial, and the matter proceeded to a bench trial. After hearing the evidence, the court found appellant guilty.

{¶7} Appellant was sentenced on January 25, 2010 to one year of community control sanctions and a six-month driver's license suspension.

{¶8} On January 29, 2010, appellant filed a notice of appeal. He herein raises the following sole Assignment of Error:

{¶9} "I. APPELLANT'S CONVICTION WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE AS THE STATE OF OHIO FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT THE SUBSTANCE WAS HASHISH."

I.

{¶10} In his sole Assignment of Error, appellant contends his conviction for possession of hashish was not supported by sufficient evidence. We disagree.

{¶11} In reviewing a claim of insufficient evidence, "[t]he 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶12} The focus of appellant's arguments as to sufficiency of the evidence is on the identity of the substance the State charged as hashish.

{¶13} Pursuant R.C. 2925.01(Z) defines hashish as "*** the resin or a preparation of the resin contained in marihuana, whether in solid form or in a liquid concentrate, liquid extract, or liquid distillate form."

{¶14} At the trial in the matter sub judice, the State called two witnesses who testified concerning the identity of the substance at issue. The first, Westerville Police Detective Brian Schwartz, recalled that he was shown the substance in question at the scene on February 4, 2009, but he was unable to visually identify it as hashish at that time. Tr. at 25-32.

{¶15} The State also called Keith Taggart, a BCI forensic chemist. Taggart performed two scientific tests on the alleged hashish: a "Modified Duquenois-Levine" test and a gas chromotography mass spectrometer test. Taggart testified that both of these tests determine the presence of Delta 9 Tetrahydrocannabinal (THC), the active ingredient in both marijuana and hashish. However, according to Taggart's cross-examination, the tests themselves do not conclusively determine whether a substance is marijuana or hashish; he was not aware of a chemical test to determine whether a substance is hashish or marijuana. He did testify that an examination of the substance under a microscope could help determine whether it was hashish or marijuana. In other words, if the substance did not show fibers or hairs under the microscope it would be hashish. However, if it did show fibers or hair under the microscope it could be either marijuana or hashish depending on its preparation. Taggart did not examine the substance under a microscope, but he observed its form during his testing.

{¶16} Taggart also testified that a test for the level of THC in the substance could identify the substance, as hashish should contain higher levels of THC than marijuana. However, he did not perform such a test on the substance at issue. His opinion that the substance in this case was hashish was based on the form it was presented to him. Appellant argues that Taggart has no formal training on the

identification of controlled substances based on their form; Taggart testified that he had taken and taught a class on marijuana identification, but he has taken no classes on the identification of hashish by sight.

{¶17} Appellant's specific argument is thus essentially two-fold: First, he maintains that Taggart's testimony failed to prove the State's allegation that the substance was hashish. Secondly, he contends Taggart was not qualified as an expert witness.

{¶18} In regard to the first facet of his argument, we note that despite the scientific difficulties in identifying hashish purely by lab testing, Taggart testified that he had twenty years of experience as a forensic chemist, and, although he had not taken formal classes on the identification of hashish (as he had for identifying marijuana), he has experience in distinguishing hashish from marijuana by sight and is familiar with Ohio laws regarding marijuana and hashish. Tr. at 47, 50-51. He also testified that unlike ashen residue from marijuana, a sticky, tar-like residue as discovered in this instance requires "preparation." Tr. at 52. See R.C. 2925.01(Z), supra. Detective Schwartz supplemented Taggart's testimony by stating that based on his experience, the "real sticky-type" substance possessed by appellant was inconsistent with plain burnt marijuana residue. Tr. at 34.

{¶19} Here, in the absence of more advanced testing for THC levels, the State chose to utilize the Modified Duquenois-Levine and gas chromotography mass spectrometer methodologies, tied together with the observations of an experienced expert chemist and police detective in order to prove its case. Viewing the evidence before us in a light most favorable to the prosecution, we hold a reasonable trier of fact

could have found, beyond a reasonable doubt, that appellant committed the crime of possession of hashish.

{¶20} In regard to appellant's secondary challenge to Taggart's testimony, we note Evid.R. 702 states that a witness may testify as an expert if all the following apply:

{¶21} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶22} (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶23} (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶24} (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶25} (2) The design of the procedure, test, or experiment reliably implements the theory;

{¶26} (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶27} However, the record in the case sub judice clearly indicates that defense counsel stipulated to Taggart's status as an expert witness. See Tr. at 37. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804: Crim.R. 52(B). In order to find plain

error under Crim.R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. *Long,* supra, paragraph two of the syllabus. Furthermore, the defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if a defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "prevent a manifest miscarriage of justice." See *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (additional citations omitted).

{¶28} Based on our review of the record and our previous analysis of the testimony, we find appellant has failed to meet his burden herein to demonstrate plain error in the qualification of Taggart as an expert, particularly where the case was not tried to a jury. We note that "[w]hen a matter is tried before the court in a bench trial, there is a presumption that the trial judge considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *In re Fair,* Lake App.No. 2007-L-166, 2009-Ohio-683, ¶ 66, internal quotations and additional citations omitted. Furthermore, our review of this portion of the argument is limited under these circumstances, as defense counsel's stipulation to Taggart's qualification as an expert relieved the State from presenting his full credentials, leaving this Court with the unacceptable task of speculating as to evidence dehors the record. See *State v. Lawless,* Muskingum App. No. CT2000-0037, 2002-Ohio-3686, citing *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452.

{¶29} Appellant's sole Assignment of Error is therefore overruled.

{¶30} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

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JUDGES

JWW/d 1028

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MITCHELL R. HATTON	:	
Defendant-Appellant	:	Case No. 10CAA010012

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES