[Cite as *State v. Horton*, 2016-Ohio-8193.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- ROBERT D. HORTON, SR. Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Craig R. Baldwin, J. Case No. CT2015-0053 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2015-0184
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 12, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX PROSECUTING ATTORNEY GERALD V. ANDERSON II ASSISTANT PROSECUTOR 27 North Fifth Street, P.O. Box 189 Zanesville, Ohio 43702-0189	DARREN L. MEADE PARKS AND MEADE, LLC 3010 Hayden Road Columbus, Ohio 43235

Wise, J.

{¶1} Appellant Robert D. Horton, Sr. appeals his conviction and sentence entered in the Muskingum County Court of Common Pleas on two counts of trafficking in cocaine following a plea of no contest.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} This case carne about from an investigation by the Central Ohio Drug Enforcement ("CODE") Task Force using a confidential informant ("CI"). The intended target was Appellant's son, Robert Horton, Jr., but due to the nature of the drug enterprise, the CI could not directly approach Horton, Jr. The CI was friends with Appellant and approached him to introduce the CI to Horton, Jr. While unintended, Appellant agreed to facilitate a drug buy between Horton, Jr. and the CI. Two separate drug buys were made, each for approximately 28 grams of cocaine.

{¶4} Appellant conducted the first controlled buy. During the second controlled buy, Appellant put the CI in direct contact with Horton, Jr. The proceeds from both of these illegal transactions went to Horton, Jr.

{¶5} On June 3, 2015, Appellant, Robert Horton, Sr. was indicted on two counts of Trafficking in Cocaine, one with a Forfeiture specification, and both were first degree felonies.

{¶6} On August 19, 2015, Appellant pled no contest to one count of Trafficking in Cocaine, amended to a third degree felony, and one count of Trafficking in Cocaine, a felony of the first degree.

{¶7} On October 5, 2015, the trial court sentenced Appellant to a mandatory term of five (5) years on the first degree felony and two (2) years on the third degree felony, to be served concurrently, for an aggregate sentence of five (5) years.

{¶8} Appellant now appeals, setting forth the following assignment of error:

ASSIGNMENT OF ERROR

{¶9} "I. THE COURT ERRED IN CONVICTING APPELLANT OF FIRST AND THIRD DEGREE TRAFFICKING OFFENSES AS THESE COCAINE OFFENSES INVOLVED MIXED SUBSTANCES UNDER RC. 2925.03(C)(4)(A) THROUGH (F), AND THE STATE FAILED TO ESTABLISH THE WEIGHT OF ACTUAL COCAINE MET THE REQUISITE STATUTORY THRESHOLD AFTER EXCLUDING THE WEIGHT OF FILLER MATERIALS USED IN THE MIXTURE."

I.

{¶10} In his sole Assignment of Error, Appellant argues that the trial court erred in convicting and sentencing him for enhanced-degree felonies. We disagree.

{¶11} More specifically, Appellant herein asserts the State failed to present any evidence regarding the purity of the cocaine-containing substance at issue, and therefore there was no evidence of the weight of the actual cocaine. Appellant argues that he could therefore be convicted of, at most, fifth-degree felony trafficking in cocaine.

{¶12} Appellant cites the case of *State of Ohio v. Gonzales,* in support of his argument that the absence of quantitative testing regarding the purity of the substances sold or offered to be sold by a defendant requires that he be convicted of and sentenced to the lowest degree of the offense.

{¶13} The issue of whether the state, in prosecuting cocaine offenses involving mixed substances under R.C. § 2925.11(C)(4)(a) through (f), must prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture, is currently before the Ohio Supreme Court on a certified conflict between the decision of the Sixth District in *State v. Gonzales,* 6th Dist. Wood No. WD–13–086, 2015–Ohio–461, and the decision of the Second District in *State v. Smith,* 2nd Dist. Greene No.2010–CA–36, 2011–Ohio–2658.

{¶14} This Court has previously ruled that in order to sustain a conviction for trafficking in cocaine, with the offense elevated from offer to sell a controlled substance based on the offered substance being cocaine and with a major drug offender specification based on weight of the drug compound, the State is required to prove the identity and a detectable amount of a controlled substance. We find that the legislature intended to prohibit the possession of any amount of a controlled substance, whether the substance occurs in its purest state or when mixed with or contained in another form. Therefore, the entire amount is included to determine the quantity involved and the penalty to be imposed. *State v. Chandler,* 5th Dist. Stark No. 2003–CA–00342, 157 Ohio App.3d 672, 2004–Ohio–3436, 813 N.E.2d 65, *aff'd,* 109 Ohio St.3d 223, 2006–Ohio–2285, 846 N.E.2d 1234; *State v. Reese,* 5th Dist. Muskingum No. CT2015–0046, 2016–Ohio–1591; *State v. Newman*, 5th Dist. Muskingum No. CT2016-0002, 2016-Ohio-7498; *State v. James*, 5th Dist. Muskingum No. CT2015-0059, 2016-Ohio-7660.

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

By: Wise, J.

Gwin, P. J., and

Baldwin, J., concur.

JWW/d 1130