[Cite as *State v. Jennings*, 2009-Ohio-2481.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-080389 TRIAL NO. B-0709919(A)
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
WILLIAM JENNINGS,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 29, 2009

Joseph T. Deters, Hamilton County Prosecutor, and *Scott M. Heenan*, Assistant Prosecutor, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

DINKELACKER, Judge.

{¶1} In five assignments of error, defendant-appellant William Jennings claims that he was improperly convicted of two counts of trafficking in cocaine and two counts of cocaine possession. We affirm.

Controlled Buys Lead to Arrest

{¶2} After an investigation involving a paid informant, Jennings and a codefendant were arrested for drug trafficking. Jennings was indicted on three counts of trafficking in cocaine and two counts of possession of cocaine. The three trafficking counts were indicted as fourth-degree felonies because of the allegation that the trafficking had occurred near a school. The codefendant, the paid informant, and the police officers who led the investigation testified at trial.

{¶3} After the testimony concluded, the trial court determined that the state had failed to prove, as a matter of law, that the transactions had occurred within 1000 feet of a school. Jennings was convicted of two of the three trafficking counts, as fifth-degree felonies, and was convicted of both of the possession counts. He was sentenced to eleven months in prison on the first trafficking charge, to six months on the second trafficking charge, and to eleven months on each of the possession charges. The possession sentences were concurrent, but the trafficking sentences were made consecutive. His total prison sentence was 28 months.

Sufficiency/Weight of the Evidence

{¶4} In three assignments of error, Jennings claims that the trial court should have granted his motion for acquittal, that his convictions were based upon insufficient evidence, and that they were against the weight of the evidence. The standards for these three arguments are well established. In a challenge to the sufficiency of the evidence,

the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.[1] The standard of review for the denial of a Crim.R. 29(A) motion to acquit is the same.[2] In a challenge to the weight of the evidence, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.[3]

{¶5} The essence of Jennings's argument on these points is that "the eyewitnesses to the alleged sales were a co-defendant expecting consideration in his case for his testimony against Mr. Jennings and a paid informant who admitted she smoked crack cocaine and usually only received payment when she made an actual purchase of drugs." This is not a sufficient basis to overturn his convictions. Even if it were, the state presented the testimony of the three police officers who orchestrated and oversaw the controlled buys.

Indictment—Cocaine versus Crack Cocaine

{¶6} As part of his sufficiency argument, Jennings contends that the indictment in this case was defective. He claims that counts one, two, and three were faulty because they alleged that he had trafficked in cocaine, when the only evidence presented on those counts was that he had trafficked in crack cocaine. We note that he was acquitted on the second count of the indictment, so we only address the arguments as they relate to the first and third counts.

{¶7} An indictment may be in the words of the statute or in words "sufficient to give the defendant notice of all the elements of the offense with which the defendant is

[1] *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.
[2] *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.
[3] *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

charged."[4] Article I of the Ohio Constitution provides that "no person shall be held to answer for an * * * infamous crime, unless on presentment or indictment of a grand jury." This provision guarantees the accused that the essential facts constituting the offense for which he will be tried will be found in the indictment of the grand jury.[5] When one of the vital elements identifying the crime is omitted from the indictment, that omission would permit a court to convict the accused on a charge essentially different from that chosen by the grand jury.[6]

{¶8} In *State v. Headley*,[7] the Ohio Supreme Court addressed the issue of how the failure to specify the name of the controlled substance in an indictment affected the validity of the indictment. In that case, the indictment did not name the drug at all, but simply asserted the involvement of "a controlled substance."[8] The state was allowed to later amend the indictment to add the language "to wit: cocaine."[9] The court noted that R.C. 2925.03 outlaws trafficking in a variety of different drugs, and that the "severity of the offense is dependent upon the type of drug involved."[10] Therefore, "R.C. 2925.03 sets forth more than one criminal offense with the identity of each being determined by the type of controlled substance involved. As such, the type of controlled substance involved constitutes an essential element of the crime which must be included in the indictment."[11]

{¶9} In counts one and three of the indictment in this case, Jennings was charged with trafficking in "cocaine" in "the vicinity of a school or in the vicinity of a juvenile." The applicable trafficking statute does not distinguish, as do other statutes, between "crack cocaine" and "cocaine that is not crack cocaine." In fact, the statute

[4] Crim.R. 7(B); see, also, R.C. 2941.05.
[5] *Harris v. State* (1932), 125 Ohio St. 257, 264, 181 N.E. 104.
[6] *State v. Wozniak* (1961), 172 Ohio St. 517, 521, 178 N.E.2d 800.
[7] (1983), 6 Ohio St.3d 475, 453 N.E.2d 716.
[8] Id.
[9] Id.
[10] Id. at 479.
[11] Id.

criminalizes trafficking in "cocaine or a compound, mixture, preparation, or substance containing cocaine" and calls all such trafficking "trafficking in cocaine."[12]

{¶10} In a recent case, the Second Appellate District addressed a similar, but ultimately distinguishable, issue. In *State v. Yslas*,[13] the defendant was indicted for possession of crack cocaine in an amount exceeding five grams but less than 25 grams.[14] The evidence presented at trial demonstrated that the drug he had actually possessed was powder cocaine.[15] The court first properly noted that "[p]owder cocaine and crack cocaine are different controlled substances."[16] But the court went on to note that "[t]he distinction is important because the type of cocaine or controlled substance possessed, in conjunction with its amount, determines the degree of the offense and thus the potential penalties."[17]

{¶11} But R.C. 2925.03(C)(4)(a) and (b) do not make a distinction between "crack cocaine" and "cocaine that is not crack cocaine." For the purposes of those two subsections, both are "trafficking in cocaine." This is buttressed by the remaining subsections of R.C. 2925.03(C)(4). In subsections (c) through (g), the Revised Code penalizes the trafficking of two separate substances: "cocaine that is not crack cocaine" and "crack cocaine," and it penalizes them differently based on the amounts involved. If the term "cocaine" as used throughout R.C. 2925.03(C)(4) did not include crack cocaine, there would have been no reason for the General Assembly to repeatedly refer to "cocaine that is not crack cocaine"—it would have simply referred to cocaine. Further, the reference to "cocaine that is not crack cocaine" assumes that there is some cocaine that *is* crack cocaine.

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[12] R.C. 2925.11(C)(4).
[13] 173 Ohio App.3d 396, 2007-Ohio-5646, 878 N.E.2d 712.
[14] Id. at ¶5.
[15] Id. at ¶13.
[16] Id., citing R.C. 2925.01(X) and (GG).
[17] Id., citing R.C. 2925.11(C)(4).

{¶12} Jennings's argument fails for another reason. Subsections (a) and (b) do not mention crack cocaine—the first to do so is R.C. 2925.03(C)(4)(c). That subsection makes it a felony of the fourth degree to traffic in crack cocaine in an amount between one and five grams. If the "general" provisions of subsections (a) and (b)—the subsections that do not require a certain amount of the drug— did not apply to crack cocaine, trafficking in less than one gram of crack cocaine would not be a crime. Trafficking in that amount must, therefore, be included in the general phrase "trafficking in cocaine" as used in R.C. 2925.03(C)(4)(a) and (b).

{¶13} For these reasons, we hold that an indictment that alleges that a defendant has trafficked in cocaine in violation of either R.C. 2925.03(C)(4)(a) or R.C. 2925.03(C)(4)(b) need not specify if the particular cocaine is either "cocaine" or "crack cocaine" or some other "compound, mixture, preparation, or substance containing cocaine." An indictment may be in the words of the statute, and the words of R.C. 2925.03(C)(4)(a) and (b) establish that the trafficking in any of those substances is "trafficking in cocaine." But the same is not true in cases involving R.C. 2925.03(C)(4)(c) through (g), where the distinction between "crack cocaine" and "cocaine that is not crack cocaine" has meaning.

{¶14} In sum, we have reviewed the evidence presented at trial. We conclude that there was sufficient evidence to convict Jennings, that his convictions were not against the weight of the evidence, and that he was not entitled to be acquitted on any of the charges for which he was convicted. We overrule his first three assignments of error.

Sentencing

{¶15} In his fourth assignment of error, Jennings argues that his sentence was excessive. But all the sentences were in the appropriate statutory ranges, and Jennings

has failed to demonstrate that the trial court abused its discretion in imposing them.[18] The fourth assignment of error is overruled.

Search Warrant

{¶16} Finally, Jennings argues that the search of his residence was improper because the "probable cause which had existed [had] grown 'stale.' " We disagree.

{¶17} Jennings notes that "the search warrant was not issued and executed until 8 days after the alleged drug sales." At the suppression hearing, the issue was decided on "the face of the affidavit," and no testimony was presented. The affidavit indicated that the last transaction had occurred "within the past seventy two hours." The affidavit was executed and the warrant was obtained on November 27 at 9:45 AM. The warrant was executed on November 29 at 6:05 AM. Thus, no more than three days had elapsed between the time of the last transaction and the time the warrant was obtained. And the warrant was executed less that 41 hours after it was issued.[19] The probable cause that existed at the time of the issuance of the warrant had not grown stale by the time the warrant was executed. We overrule Jennings's final assignment of error.

Conclusion

{¶18} For the reasons set forth above, we overrule Jennings's five assignments of error and affirm the judgment of the trial court.

Judgment affirmed.

HILDEBRANDT, P.J., and **PAINTER, J.,** concur.

Please Note:

The court has recorded its own entry this date.

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[18] See *State v. Burton*, 1st Dist. No. C-080173, 2009-Ohio-871, at ¶23, citing *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, paragraph seven of the syllabus; *State v. Smith*, 1st Dist. No. C-060991, 2008-Ohio-2561, at ¶¶17-19.

[19] See Crim.R. 41(D) (allowing three days for the execution of a search warrant).