[Cite as *State v. Vu*, 2009-Ohio-2945.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO Appellee v. LAN T. VU LAI T. VU HUONG T. NGUYEN KHUONG V. HOANG PHU V. HOANG Appellants	C. A. Nos. 07CA0094-M, 07CA0095-M 07CA0096-M, 07CA0107-M, 07CA0108-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE Nos. 06-CR-0374, 06-CR-0373 06-CR-0367, 06-CR-0365 06-CR-0366

DECISION AND JOURNAL ENTRY

Dated: June 22, 2009

MOORE, Presiding Judge.

{¶1} Appellants, Lai Vu, Lan Vu, Khuong Hoang, Phu Hoang, and Huong Nguyen appeal the decision of the Medina County Court of Common Pleas. This Court reverses and remands for a resentencing hearing.

I.

{¶2} In April of 2006, Medway agents began surveillance on eight properties in Brunswick, Ohio, on suspicion of cultivation and possession of marijuana. Through the investigation, Medway agents noted a pattern of behavior of the subjects of the surveillance. Agents stated that they observed several people of Asian descent traveling among the eight locations. The eight locations were; Stoneybrook Lane apts. 104, 106, and 107, a Grand Lake apartment, and single family homes located at 4784 Baywood, 3384 Red Clover, 1480 Troon

Avenue, and 5138 Autumnwood in Brunswick or Brunswick Hills, Ohio. According to agents, residents of the Stoneybrook Lane apartments owned the Red Clover, Baywood, and Troon properties. For instance, Lai Vu, who was on the lease of Stoneybrook Lane apt. 104, owned the Red Clover property. Agents determined that the Red Clover and Troon properties were the site of a large-scale marijuana cultivation operation. They also determined that the Baywood property was in the beginning stage of being set up to grow marijuana in the same fashion as the other two homes. Agents termed these three houses "grow houses." Agents observed suspects going to these three homes throughout the day and sleeping at the apartments. Agents noted the same vehicles coming and going from the homes and apartments and that all the subjects appeared to share their vehicles. They further observed the suspects purchasing several items, including electrical equipment, at Home Depot.

{¶3} On June 15, 2006, a search warrant was executed at all eight properties. The appellants were all detained and eventually arrested. Accordingly, on June 23, 2006, the appellants were indicted for possession of marijuana, greater than 20,000 grams, along with forfeiture specifications. On August 17, 2006, a supplemental indictment was filed, charging the appellants with the following crimes: possession of marijuana, in violation of R.C. 2925.11(A)/(C)(3)(f), two counts of conspiracy to commit possession of drugs, in violation of R.C. 2923.01(A)(1)/(2) and R.C. 2925.11(A),(C)(3)(f), complicity to commit possession of drugs, in violation of R.C. 2923.01(A)(2) and R.C. 2925.11(A)/(C)(3)(f), illegal cultivation of marijuana, in violation of R.C. 2925.04(A)/(C)(5)(f), two counts of conspiracy to commit illegal cultivation of marijuana, in violation of R.C. 2923.01(A)(1)/(2) and R.C. 2925.04(A)/(C)(5)(f), and complicity to commit illegal cultivation of marijuana, in violation of R.C. 2923.03(A)(2) and

R.C. 2925.04(A)(C)(3)(f). Finally, the appellants were charged with two counts of forfeiture, pursuant to R.C. 2925.42(A)(1).

{¶4} The appellants all pled not guilty to the charges and their cases proceeded to jury trials. Lai and Lan Vu's trials were consolidated. At the conclusion of their trials, the appellants were all sentenced to various terms of incarceration. The appellants separately appealed their sentences and convictions. Their appeals were consolidated by this Court. The appellants have each raised separate assignments of error, asserting 91 in total. This Court has combined and rearranged the assigned errors to facilitate our review.

II

Sentencing Errors

Post-release control "up to 3 years":

{¶5} As an initial consideration, this Court must review whether Lai, Lan, Phu, Khuong, and Huong's sentences were void due to the trial court's improper notification of post-release control. We conclude that based upon Ohio Supreme Court precedent, the appellants' sentences are void and therefore, we must vacate their sentences and remand for re-sentencing hearings.

{¶6} The Ohio Supreme Court has recently reiterated its position with regard to proper notification of post-release control. "In cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence." *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at syllabus. The Court applied the reasoning from *State v. Beasley* (1984), 14 Ohio St.3d 74, in which it determined that when a

trial court disregarded a statutory mandate, it "exceeded its authority and this sentence must be considered void." *Beasley*, supra, at 75. To this end, the trial court was required to properly notify each appellant about post-release control at the sentencing hearing and to incorporate that notice into its sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at paragraph one of the syllabus. Failure to provide this notice is a failure to comply with the mandatory provisions in R.C. 2929.19(B)(3)(c) and (d). *Jordan*, supra, at paragraph two of the syllabus.

{¶7} R.C. 2929.19(B) states, in pertinent part, "if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court *shall* *** *[n]otify* the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree[.]" (Emphasis added.) R.C. 2929.19(B)(3)(c). The notification requirement of R.C. 2929.19(B) is mandatory. *Jordan*, supra, at paragraph two of the syllabus. Further, R.C. 2929.14(F)(1) states, in pertinent part, that "[i]f a court imposes a prison term *** for a felony of the second degree, *** it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division." Thus, in order to comply with R.C. 2929.19(B)(3)(c) and R.C. 2929.14(F), the trial court must notify the offender of post-release control pursuant to the relevant portion of R.C. 2967.28 both at the sentencing hearing and in its sentencing entry.

{¶8} R.C. 2967.28(B) states, in pertinent part, that "[e]ach sentence to a prison term for a felony *** of the second degree, *** shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment." For a felony of the second degree, the mandatory period of post-release control

is three years. R.C. 2967.28(B)(2). This section further explains that if the trial court sentences a defendant to a prison term for a third, fourth, or fifth degree felony not subject to R.C. 2967.28(B)(1) or (3), then the trial court "shall include a requirement that the offender be subject to a period of post-release control of *up to three years* after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender." (Emphasis added.) R.C. 2967.28(C). Accordingly, post-release control is mandatory for a second degree felony, and discretionary for a third, fourth or fifth degree felony not subject to R.C. 2967.28(B)(1) or (3).

{¶9} In the instant case, the trial court notified the appellants at their sentencing hearings and in their sentencing entries that "post release control is mandatory in this case *up to a maximum* of 3 years[.]" (Emphasis added). In so stating, the trial court has misapplied R.C. 2967.28(B)(2) and (C) by essentially combining the terms of the statute. The Ohio Supreme Court has explained that the legislature enacted R.C. 2929.14(F) and R.C. 2967.28 to ensure the objectives of accuracy in sentencing and proper notice to the defendants. *Simpkins*, supra, at ¶17. In this case, by failing to properly notify the appellants of their exact periods of post-release control, the trial court has circumvented the purpose of the above mandatory statutes. See *State v. Bloomer*, ___ Ohio St.3d ___, 2009-Ohio-2462, at ¶69.

{¶10} The Ohio Supreme Court has "repeatedly stated that if the meaning of a statute is clear on its face, then it must be applied as it is written. Thus, if the statute is unambiguous and definite, there is no need for further interpretation. To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." (Internal citations and quotations omitted.) *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶11. We conclude that the relevant statutes here are not ambiguous.

{¶11} Further, the Supreme Court has explained that it has consistently held "that a sentence that does not contain a statutorily mandated term is a void sentence." *Simpkins*, supra, at ¶14, citing *Beasley*, supra. "Because a sentence that does not conform to statutory mandates requiring the imposition of postrelease control is a nullity and void, it must be vacated." *Simpkins*, at ¶22. We are bound to follow the Supreme Court's directive, and therefore we conclude that the trial court's failure to properly notify the appellants of post-release control renders their sentences void. Accordingly, their sentences must be vacated and remanded for a resentencing hearing.

{¶12} Finally, we conclude that this decision is not in conflict with the Ohio Supreme Court's directive regarding notification of post-release control at a plea hearing. The Ohio Supreme Court has explained that the requirement pursuant to Crim.R. 11(C) to notify a defendant of post-release control prior to accepting a guilty plea is not a constitutional right. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, at ¶48. Accordingly, an appellate court must determine if the trial court substantially complied with the non-constitutional portions of Crim.R. 11 prior to accepting the plea. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, at ¶12; *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509. However, the Supreme Court has not taken such an approach with regards to sentencing and complying with the statutory mandates requiring the imposition of post-release control. Instead, the Court has

> "detailed the constitutional significance of a trial court including postrelease control in its sentence. We stated that because the separation of powers doctrine precludes the executive branch of government from impeding the judiciary's ability to impose a sentence, the problem of having the Adult Parole Authority impose postrelease control at its discretion is remedied by a trial court incorporating postrelease control into its original sentence. Consequently, unless a trial court includes postrelease control in its sentence, the Adult Parole Authority is without authority to impose it." (Internal citations omitted.) *Jordan*, supra, at ¶19, citing *Woods v. Telb*, 89 Ohio St.3d 504 at 512-513.

{¶13} As the Ohio Supreme Court refers to the requirement to comply with the statues as having constitutional significance, the reasoning for applying substantial compliance to the requirement to notify a defendant of post-release control prior to accepting a guilty plea, i.e. that it is not a constitutional right, does not apply. Further, as we stated above, the Supreme Court has explained that if a statute is unambiguous, it must be applied as written. *Pelfrey*, supra, at ¶11. As the relevant statutes are not ambiguous, the trial court was required to fully comply with their mandates. See Id., at ¶14. Therefore, this opinion is not in conflict with this Court's line of cases requiring substantial compliance with Crim.R. 11(C)(2) when reviewing the trial court's acceptance of a guilty plea.

{¶14} Accordingly, the appellants' sentences are vacated and the cause is remanded to the trial court for resentencing.

Manifest Weight and Sufficiency

Manifest weight/Sufficiency:

{¶15} Our resolution that these appellants' sentences are void does not render their challenges to the sufficiency of the evidence moot. The Ohio Supreme Court "distinguish [ed] between appellate court reversals based solely upon insufficiency of the evidence and those based on ordinary 'trial errors'." *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶18. Pursuant to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, notwithstanding some procedural defect by the trial court warranting reversal, the State remains entitled to "one, and only one, full and fair opportunity" to prosecute the defendant in regard to a single offense. *Richardson v. United States* (1984), 468 U.S. 317, 331. We recently explained that the *Brewer* court recognized "that the State is not entitled to retry a criminal defendant after reversal for trial court

error if the State failed in the first instance to present sufficient evidence." *State v. Vanni*, 9th Dist. No. 08CA0023-M, 2009-Ohio-2295, at ¶15, citing *Brewer*, supra, at ¶8. Accordingly, a defendant's assigned error that the conviction is based on insufficient evidence is not moot. *Vanni*, supra, at ¶15.

Lai, Lan, Phu and Khuong:

{¶16} The overwhelming majority of the briefs of these appellants are identical. Some minor adjustments are made to identify differences in the State's evidence against each party, but the legal arguments are copied practically verbatim. In their sixth assignments of error, Lai, Lan, Phu, and Khuong assert that their convictions were against the manifest weight of the evidence and were based upon insufficient evidence. While these appellants allege in their sixth assignments of error that their convictions were against the manifest weight of the evidence, their supporting argument focuses on the sufficiency of evidence. Their argument as to their sixth assignments of error neither refers to the credibility of witnesses nor does it request this Court to weigh the evidence. See App.R. 16(A)(7) (requiring an appellant to support his assignment of error with an argument and reasons in support of his contentions.) As such, we read these appellants' sixth assignments of error as an argument that their convictions were not based on sufficient evidence. We find that due to the lack of substantiation in these appellants' arguments, we are unable to reach the merits of their assigned errors.

{¶17} These appellants "laid out the standard of review for both sufficiency of the evidence and manifest weight, but [they] failed to cite any authority in [their] argument that would support [their] contentions, which is required under App.R. 16(A)(7)[.]" *State v. Stelzer*, 9th Dist. No. 23174, 2006-Ohio-6912, at ¶5.

{¶18} App.R. 16(A)(7) required these appellants to state the reasons in support of their contentions "with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary." Loc.R. 7(B)(7) requires that an appellant's assignment of error "*shall* contain the contentions of the appellant with respect to the assignments of error and the supporting reasons with citations to the authorities and statutes on which the appellant relies." (Emphasis added.) These appellants have presented this Court with one paragraph stating that the State failed to show evidence of various facts. This paragraph, at best, could be considered a summary.

{¶19} These appellants do not explain how the alleged failures on the part of the State amounted to a failure to establish the elements of the convicted crimes. In fact, these appellants neglect to explain to this Court which elements they believe the State had to prove, or the respects in which the proof was lacking. These appellants were each convicted of eight offenses, involving conspiracy, possession and complicity. Although they complain of a litany of facts they contend the State failed to show, nowhere do they explain to which element of which crime these alleged failures relate.

{¶20} We have consistently stated that an appellant has the burden to affirmatively demonstrate an error on appeal. *Stelzer*, at ¶7; *State v. Ha*, 9th Dist. No. 07CA0089-M, 2009-Ohio-1134, at ¶24. If an argument exists that could support these appellants' assignment of error, it is not our duty to ferret it out. See *Cardone v. Cardone* (May 6, 1998), 9th Dist. Nos. 18349 and 18673, at *8. These appellants, although each presents his or her own brief on appeal, have simply copied and pasted their argument one from the other, with no regard to the fact that they do not share a common record below. The arguments do not direct us to any portion of the voluminous transcript where we might find support. Therefore, if this Court were inclined to

ignore these appellants' noncompliance and create an argument for them, we would be required to review three separate trial transcripts, each consisting of almost a thousand pages. We decline to indulge in such a monumental task without requiring these appellants to comply with the appellate and local rules at the most basic level by providing us a roadmap to guide our discussion. Accordingly, we disregard the arguments. App.R. 16(A)(7), App.R. 12(A)(2), Loc.R. 7(B)(7). Lai, Lan, Phu, and Khuong's sixth assignments of error are overruled.

Huong Nguyen:

{¶21} In her first and second assignments of error, Huong contends that her convictions for conspiracy were not based on sufficient evidence and were against the manifest weight of the evidence. Although Huong contends under her first assignment of error that her conspiracy convictions were not based upon sufficient evidence, her argument with regard to this error consists of challenges to the jury verdict forms. As she fails to separately assign error to any issue regarding the verdict forms or instructions, we decline to address this argument on appeal. App.R. 16(A)(7), App.R. 12(A)(2), Loc.R. 7(B)(7). Further, Huong does not raise an issue with the credibility or weight of the evidence. See App.R. 16(A)(7). Accordingly, we will limit our discussion to address Huong's claims that her convictions were based on insufficient evidence.

{¶22} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production, while a manifest weight challenge requires the court to examine whether the prosecution has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to

> determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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, paragraph two of the syllabus.

{¶23} In the instant case, Huong was convicted of two counts of conspiracy to cultivate marijuana and two counts of conspiracy to commit possession of drugs, in violation of R.C. 2923.01(A)(1) and R.C. 2923.01(A)(2). Pursuant to R.C. 2923.01,

> "(A) No person, with purpose to commit or to promote or facilitate the commission of *** a felony drug trafficking, manufacturing, processing, or possession offense, theft of drugs, or illegal processing of drug documents, *** shall do either of the following:
>
> "(1) With another person or persons, plan or aid in planning the commission of any of the specified offenses;
>
> "(2) Agree with another person or persons that one or more of them will engage in conduct that facilitates the commission of any of the specified offenses."

R.C. 2923.01(B) provides that

> "[n]o person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by the accused or a person with whom the accused conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed."

{¶24} Specifically, Huong contends that there was no evidence that she entered into an agreement or plan or that she committed a substantial overt act in furtherance of the conspiracy. We do not agree.

{¶25} Initially, we note that R.C. 2923.01(B) does not require the State to show that Huong herself committed a substantial overt act. Rather, the State was required to show that a substantial overt act was committed by either Huong *or* by a person with whom she conspired, subsequent to her entrance into the conspiracy. R.C. 2923.01(B). Accordingly, we look to the

evidence to determine if a reasonable juror could find that the State showed that Huong was indeed part of the conspiracy and if any of her co-conspirators committed a substantial overt act after her entrance into the conspiracy. We conclude that such evidence exists.

{¶26} Huong does not appear to contest the fact that the State presented a substantial amount of evidence to prove that a conspiracy existed. Rather, she contends that the State did not show that she was part of the conspiracy. To this end, the State presented the testimony of Tuan Do, a co-defendant, who testified to his role in the conspiracy. He specifically testified that he lived and worked at the Troon grow house. He explained that Henry Tran, Huong's fiancé, was the person who brought him to Brunswick to water the marijuana plants. Do stated that when he first moved to Brunswick, at the beginning of May of 2006, he stayed at the apartment that Henry and Huong shared. He explained that he and Henry had conversations in Huong's presence regarding what was going on at the Troon grow house.

{¶27} Do further explained that he moved into the Troon grow house and that Henry, as well as many others, including Huong, would come to the Troon grow house. He stated that Henry explained to him that people would come over and bring their children in order to make it look like a family lived there. He testified that Huong brought her children to the house. He further identified Huong from a photograph taken at the Troon grow house. Do testified that he primarily worked in the basement of the home, watering the marijuana plants. He stated that Huong brought him down a coke, water, beer or food one or two times. Reviewing this testimony in the light most favorable to the prosecution, we find that the State has presented sufficient circumstantial evidence to establish that Huong agreed with another person to engage in the conduct that facilitated the conspiracy. Huong does not contend that other co-conspirators did not commit substantial overt acts in furtherance of the conspiracy. Having found that Huong

was a part of the conspiracy *at least* since the beginning of May of 2006, when Tuan Do first moved to her apartment and discussed the details of the grow in her presence, any of her co-conspirators' substantial overt acts could be contributed to her. R.C. 2923.01(B).

{¶28} As we stated above, "an overt act is substantial when it is of a character that manifests a purpose on the part of the actor that the object of the conspiracy should be completed." Id. Investigating officers testified that all three grow houses were nearly identical in their set up, indicating a sophisticated marijuana cultivation conspiracy. Further, investigating officers testified to several surveillance videos showing Huong's co-conspirators purchasing gardening and electrical supplies from Home Depot. The officers testified that receipts from these purchases were found at the homes and that some of the grow materials were located at the Troon grow house, as well as the other grow houses. Finally, we have specifically pointed to Tuan Do's testimony that he was hired to water and maintain the marijuana plants that were growing in the basement at the Troon grow house. We conclude that a reasonable juror could conclude that this admission amounts to a substantial overt act in accordance with R.C. 2923.01(B). We further conclude that a reasonable jury could find that the purchase and use of the grow materials to cultivate marijuana was a substantial overt act, in furtherance of the conspiracy. Finally, both of these acts occurred after the beginning of May, 2006. Therefore, we find that the State presented sufficient evidence upon which a reasonable juror could find the essential elements necessary to convict Huong of the conspiracy charges. Huong's first and second assignments of error are overruled.

All Appellants Remaining Assignments of Error

{¶29} Based upon our determination that the appellants' sentences are void, their remaining assignments of error are moot. Accordingly, we decline to address them here. App.R. 12(A)(1)(c).

III.

{¶30} The appellants' sentences are void. The appellants' assignments of error with regard to sufficiency are overruled. We decline to address their remaining assignments of error. The judgment of the Medina County Court of Common pleas is vacated and remanded for proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶31} I concur in the judgment only. I write to point out that in light of the issues raised by the majority concerning the Appellants' briefs, it appears that it would have been appropriate to have granted the Appellants leave to exceed the page limitations for their merit briefs.

APPEARANCES:

MICHAEL J. CALLOW, Attorney at Law, for Appellants.

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.