[Cite as *Wadsworth v. Eutin*, 2010-Ohio-4654.]

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

CITY OF WADSWORTH Appellee v. CANDICE R. EUTIN Appellant	C. A. No. 09CA0074-M APPEAL FROM JUDGMENT ENTERED IN THE WADSWORTH MUNICIPAL COURT COUNTY OF MEDINA, OHIO CASE No. 09CRB00476(A)-(B)

DECISION AND JOURNAL ENTRY

Dated: September 30, 2010

Per Curiam.

{¶1} Appellant, Candice R. Eutin, appeals her conviction from the Wadsworth Municipal Court. This Court affirms.

I.

{¶2} Sergeant Melissa Blubaugh of the Wadsworth Police Department and another officer were monitoring traffic in the City of Wadsworth when their radar indicated that the car driven by Eutin was speeding. The officers initiated a traffic stop and approached Eutin's car. Sergeant Blubaugh recognized Eutin from prior encounters and knew her to be a previous heroin user. Sergeant Blubaugh called another officer to the scene who worked with a drug-sniffing dog. Sergeant Blubaugh asked Eutin to exit her vehicle and stood with Eutin near the police cruiser while Officer Cindia led his dog around Eutin's car. The dog alerted on the car, thus, Officer Cindia searched the interior of the car.

{¶3} Officer Cindia found Eutin's purse on the passenger seat of the car and searched through it. In a zippered pocket within the purse, he found three hypodermic syringes, the plunger from a syringe, and a spoon with burn marks and a crusty residue. He also found a portion of a cellophane wrapper from a package of cigarettes in the purse and pieces of plastic sandwich bags containing some white residue on the floor on the passenger side of the car. None of the officers field tested the objects for the presence of drugs. Instead, some of items were sent to the Bureau of Criminal Identification and Investigation ("BCI") for testing.

{¶4} Eutin was charged with a violation of R.C. 2925.12(A), possession of drug abuse instruments, and a violation of Wadsworth Code of Ordinances ("W.C.O."), Section 138.13, use, possession, or sale of drug paraphernalia. She entered a plea of not guilty and was found guilty of both charges by the trial court after a trial to the bench. The trial court entered sentences for each conviction individually. Eutin has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "APPELLANT EUTIN'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANT EUTIN USED OR PREPARED A DANGEROUS DRUG WITH THE INSTRUMENTS FOUND IN HER PURSE, AN ESSENTIAL ELEMENT TO PROVE POSSESSION OF DRUG ABUSE INSTRUMENTS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT."

{¶5} Eutin alleges in her first assignment of error that the City of Wadsworth ("the City") failed to produce sufficient evidence at trial to support her conviction for possession of drug abuse instruments as provided in R.C. 2925.12. Specifically, Eutin argues that there was insufficient evidence to demonstrate that she used the articles found by police to use or prepare a dangerous drug. We disagree.

{¶6} 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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

"In essence, sufficiency is a test of adequacy." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. When reviewing sufficiency, this Court "considers all the evidence admitted against the appellant at trial." *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶80. See, also, *In re T.A.F.*, 9th Dist. No. 09CA0046-M, 2010-Ohio-3000, at ¶24 (The appellate court must consider all evidence presented, whether properly or improperly admitted.).

{¶7} Eutin was convicted of a violation of R.C. 2925.12(A), which provides:

> "[n]o person shall knowingly make, obtain, possess, or use any instrument, article, or thing the customary and primary purpose of which is for the administration or use of a dangerous drug *** when the instrument involved is a hypodermic or syringe *** and the instrument, article, or thing involved has been used by the offender to unlawfully administer or use a dangerous drug *** or to prepare a dangerous drug *** for unlawful administration or use."

She argues that the City failed to prove that she used the syringes found in her purse to use or prepare a dangerous drug.

{¶8} At the trial, Sergeant Blubaugh testified that she was familiar with Eutin based on prior arrests and that Eutin was a known drug addict. In light of this, Sergeant Blubaugh called Officer Cindia to have his drug dog evaluate Eutin's vehicle. While Officer Cindia worked with the drug dog, Sergeant Blubaugh asked Eutin if she was still using heroin. Eutin said that she

was not. Officer Cindia reported to Sergeant Blubaugh that he had located drug paraphernalia in Eutin's purse and in the passenger side of the car after the drug dog alerted on that side. Sergeant Blubaugh was unable to remain on the scene because she was called to respond to an emergency call.

{¶9} Officer Cindia conducted the search of Eutin's vehicle and purse. He testified at trial as to his training specific to drug enforcement. He stated that he has been the full-time canine officer with the Wadsworth Police Department for the past eight years and has completed extensive training on drug identification. Additionally, Officer Cindia trains every two weeks with his canine partner in drug and drug paraphernalia identification. When Officer Cindia walked his drug dog around Eutin's car on the day of the stop, the dog aggressively alerted to the odor of narcotics coming from the passenger-side door of Eutin's car.

{¶10} Upon searching the vehicle, Officer Cindia discovered a piece of a ripped, plastic baggie on the floor on the front, passenger side. He testified that it contained a white residue and was characteristic of packaging of drugs for personal use. Officer Cindia located Eutin's purse sitting on the passenger-side seat and searched it. In a zippered pocket within the purse, Officer Cindia found three syringes and a burnt spoon containing a white, powdery residue. He further testified that heroin is often "cooked" in a spoon with a lighter then drawn into a syringe to be injected. He stated that the condition of the spoon indicated it was used to prepare an opiate, such as heroin, for use. He also found a portion of a cellophane cigarette wrapper in Eutin's purse that had a white residue on it. Officer Cindia testified that sometimes drugs are carried in cigarette wrappers.

{¶11} The City presented evidence that Eutin was known by police to be a heroin user and that a dog trained to detect narcotics alerted to the presence of drugs on the passenger side of

Eutin's car. Inside the car, on the passenger side, Officer Cindia found pieces of plastic bag with a powdery residue. Further, Officer Cindia found syringes and a burnt spoon with residue together in the same zippered portion of Eutin's purse. The condition of these items and the fact that they were found together indicated to Officer Cindia that the items had been used to inject or prepare drugs. The prosecution is permitted to prove an essential element of the crime with circumstantial evidence. *State v. Brooks*, 9th Dist. No. 23236, 2007-Ohio-506, at ¶24. Based on the foregoing, the City presented sufficient evidence from which a rational trier of fact could have concluded that Eutin had used the syringes to administer or prepare a drug for use. Eutin's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "APPELLANT EUTIN WAS IMPROPERLY SENTENCED ON TWO ALLIED OFFENSES OF SIMILAR IMPORT IN VIOLATION OF R.C. []2941.25, THEREBY VIOLATING HER FIFTH AMENDMENT RIGHT AGAINST DOUBLE JEOPARDY."

{¶12} In her second assignment of error, Eutin argues that possession of drug abuse instruments in violation of the Ohio Revised Code and use, possession, or sale of drug paraphernalia in violation of the Wadsworth City Ordinances are allied offenses of similar import, thus, her convictions should have been merged for sentencing purposes. Although the City has conceded this point, we disagree.

{¶13} In her merit brief, Eutin acknowledges that she did not object to her sentence below, thus, we review her argument for plain error. *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2. The Supreme Court of Ohio has held that it is plain error for a trial court to fail to merge allied offenses of similar import. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, at ¶31.

{¶14} "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). The Supreme Court of Ohio has outlined a two-step test for courts to determine whether two or more convictions constitute allied offenses of similar import. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, at ¶14.

> "'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" (Emphasis in original.) Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶15} Eutin was convicted pursuant to R.C. 2925.12(A), which, as discussed above, requires the prosecution to prove that Eutin knowingly possessed a syringe that she used to administer or prepare a dangerous drug. Eutin was also convicted of violating W.C.O. 138.13, use, possession, or sale of drug paraphernalia. "Drug paraphernalia" is defined as

> "any equipment, product, or material of any kind that is used by the offender, intended by the offender for use, or designed for use, in propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body, a controlled substance ***." W.C.O. 138.13(A).

Drug paraphernalia includes a " *** spoon, *** for compounding a controlled substance"; "container for packaging small quantities of a controlled substance"; "container *** for storing *** a controlled substance"; and "[a] hypodermic syringe[.]" W.C.O. 138.13(A)(9)-(12).

{¶16} In comparing the language of R.C. 2925.12 and W.C.O. 138.13, it is clear that R.C. 2925.12 pertains only to syringes and that W.C.O. 138.13 mentions a non-exhaustive list of

items that are drug paraphernalia, which includes syringes. Possession of a syringe is punishable under both laws, however, possession of a multitude of other items, such as a spoon to prepare a drug or a plastic bag to store a drug, are punishable under W.C.O. 138.13, but not under R.C. 2925.12. Possession of either of these items constitutes a separately identifiable offense from possession of a syringe that the offender has used or intends to use. Thus, the elements of the two offenses do not correspond to such a degree that commission of one offense will necessarily result in commission of the other offense. *Cabrales* at ¶14. Possession of drug abuse instruments and use, possession or sale of drug paraphernalia are not allied offenses of similar import and we need not consider the second step of the test. See id. The trial court did not err by ordering separate sentences on Eutin's convictions for the offenses. Eutin's second assignment of error is overruled.

III.

{¶17} Eutin's assignments of error are overruled. The judgment of the Wadsworth Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wadsworth Municipal Court, 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 Appellant.

BETH WHITMORE
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

BELFANCE, P. J.
DISSENTS, SAYING:

{¶18} In my view, the City failed to present sufficient evidence that Eutin violated R.C. 2925.12(A), therefore, I respectfully dissent.

{¶19} The language of R.C. 2925.12(A) is clear that possession of a syringe is punishable if it is demonstrated that the syringe has been *used* to administer, use, or prepare a *dangerous drug* for use. See, also, *State v. Franklin* (July 27, 1989), 8th Dist. Nos. 55604, 55684, at *14 (interpreting R.C. 2925.12(A) to require proof of use of the instrument); *State v. Sanders* (June 20, 1978), 7th Dist. No. 78 C.A. 41, at *1 (reversing the appellant's conviction because the state failed to produce evidence at trial that the appellant had used the syringe "to unlawfully administer or use a dangerous drug or to prepare a dangerous drug"). I would find that the City's evidence was insufficient to justify the trial court's finding that Eutin violated R.C. 2925.12(A) because the evidence did not demonstrate that Eutin (1) *used* the syringe (2) to unlawfully administer, use or prepare a *dangerous drug*.

{¶20} Although Sgt. Blubaugh knew Eutin to be a heroin user in the past, neither officer testified that Eutin appeared to be under the influence of any illicit drug on the day of the traffic stop. None of the officers on the scene field-tested any of the items found in Eutin's car for the presence of a dangerous drug. Although some of the items were sent to BCI for testing, the results of those tests were not presented at trial because they were not yet available. No evidence was introduced at trial nor made part of the record that any amount of a dangerous drug was present on any of the items recovered from Eutin's car.

{¶21} I acknowledge that we must review the evidence in the light most favorable to the prosecution, however, even when viewing the evidence in the light most favorable to the prosecution, in my view, a rational trier of fact could not have found that the essential elements of this offense were met. The City chose to go forward without BCI test results that could have at least established that drugs were present on the items recovered from Eutin's car. Although other items, such as a burnt spoon and plastic baggies, were recovered and contained a powdery substance, R.C. 2925.12 is specific to syringes. While the spoon and baggies may support another charge, they do not clearly demonstrate that Eutin used the syringe to use, administer, or prepare a dangerous drug, particularly in light of the City's failure to present evidence of the presence of a dangerous drug on any of the items recovered.

{¶22} Other Districts considering the sufficiency of the evidence for violations of R.C. 2925.14(C)(1), possession of drug paraphernalia, have utilized a similar analysis. R.C. 2925.14(C)(1) provides that "[n]o person shall *knowingly use, or possess with purpose to use*, drug paraphernalia." (Emphasis added.) The Eighth District in *Newburgh Hts. v. Moran*, 8th Dist. No. 84316, 2005-Ohio-2610, at ¶15, held that the appellant's conviction was not based on sufficient evidence because the prosecution did not produce evidence that the marijuana pipe

found in appellant's possession had been used because there was no evidence that the pipe contained drug residue. The court further held that testimony of a police officer that the pipe was of the type customarily used to smoke marijuana was insufficient to establish the appellant had used it for that purpose. Id. at ¶11. In reaching its conclusion, the court examined the factually similar case of *Bowling Green v. Mt. Castle* (Feb. 27, 1998), 6th Dist. No. WD-97-056. The Second District reached the same result in *State v. Smith* (Jan. 7, 1994), 2nd Dist. No. 3013, at *3. In that case, although the police found a crack pipe on appellant, the pipe did not contain crack cocaine and the residue present in the pipe was not tested. Id. at *2. The court recognized that the pipe was burned, contained some sort of residue and that the officer testified as to the general use of such a device with respect to illegal drugs. Id. at *3. The court ultimately held, however, that the state failed to present sufficient evidence to satisfy an element of the crime, namely, that appellant used or intended to use the pipe to smoke crack cocaine because the state did not present evidence of the presence of a drug on the pipe. Id. at *3-*4.

{¶23} Likewise, in the instant matter, the majority suggests that the circumstantial evidence the City presented: the burned condition of the spoon, the presence of residue on the spoon and baggies, and Officer Cindia's testimony describing the usual way in which drugs are prepared for injection with a syringe, leads to the conclusion that Eutin used the syringe to use, administer, or prepare a dangerous drug. I acknowledge that such evidence goes to the element of possession, but not to use. R.C. 2925.12(A) clearly requires more than an element of possession; it also requires proof of the use of the syringe to unlawfully administer, use or prepare a dangerous drug. I would hold that the City failed to present sufficient evidence at trial to satisfy the essential elements of R.C. 2925.12(A).

{¶24} Finally, because I would reverse Eutin's conviction under R.C. 2925.12(A), I would not reach Eutin's second assignment of error with respect to merger.

APPEARANCES:

J. DEAN CARRO, Director Legal Clinic, University of Akron School of Law, Office of Appellate Review, for Appellant.

NORMAN BRAGUE, City of Wadsworth Prosecutor, PAGE C. SCHROCK, Assistant Prosecuting Attorney, for Appellee.