

[Cite as *State v. Darrah*, 2010-Ohio-1406.]

STATE OF OHIO, JEFFERSON COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)
PLAINTIFF-APPELLEE,) CASE NO. 09 JE 23
- VS -)
MICHAEL LEE DARRAH,) OPINION
DEFENDANT-APPELLANT.)

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 09 CR 42.

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:

Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: March 11, 2010

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Michael L. Darrah, appeals the decision of the Jefferson County Court of Common Pleas convicting him of one count of drug trafficking and sentencing him accordingly. On appeal, Darrah contends that his conviction is against the manifest weight of the evidence and his sentence is erroneous. Upon review, his arguments are meritless.

{¶2} Darrah's conviction is not against the manifest weight of the evidence. The State provided the testimony of an eye-witness to the drug transaction, along with other corroborating witness testimony and documentary evidence. In finding Darrah guilty, the trial court did not lose its way so as to create a manifest miscarriage of justice. Further, Darrah's sentence is not clearly and convincingly contrary to law or an abuse of discretion. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On April 1, 2009, the Jefferson County Grand Jury indicted Darrah on one count of drug trafficking pursuant to R.C. 2925.03(A)(1)(C)(3)(a) (marijuana), a fifth degree felony; and one count of aggravated drug trafficking pursuant to R.C. 2925.03(A)(1)(C)(1)(a) (methadone), a fourth degree felony. These charges stemmed from allegations that Darrah traded methadone and marijuana for Vicodin with a woman named Billie Jo Cook. The morning after the alleged exchange, Billie Jo died of an apparent drug overdose, which sparked an investigation and led to the trafficking charges.

{¶4} A bench trial commenced on June 11, 2009. Thelma Nelson lived with Billie Jo for several months prior to her death. Nelson testified that on the afternoon of January 14, 2009, Billie Jo injured her hand. Billie Jo's sister, Rita Bates, and their mother, Elizabeth Cook, came to Billie Jo's home and upon observing the injury decided to take Billie Jo to the hospital. Nelson remained at the home with her children and with Billie Jo's eleven-year-old daughter, Jessica. While Billie Jo was at the hospital, Nelson

received a phone call from Darrah, asking her what Billie Jo "got from the hospital." Nelson assumed Darrah was asking about Billie Jo's prescriptions, because Billie Jo would often trade her prescription drugs or sell them to Darrah.

{¶5} Nelson said Darrah arrived at Billie Jo's home with his girlfriend Nicole Boggs before Billie Jo returned from the hospital. Once Billie Jo got there, Nelson, Billie Jo, and Darrah went into the bedroom while Boggs waited in the living room. Nelson said that Darrah then traded his eight methadone pills and a marijuana joint for ten of Billie Jo's Vicodin pills. Nelson said she saw the two exchange the drugs hand-to-hand. Nelson testified she is familiar with the appearance of Vicodin and methadone pills. She also heard Darrah state specifically that the pills he traded with Billie Jo were methadone. She said Billie Jo had obtained methadone from Darrah in the past.

{¶6} Nelson testified that she witnessed Billie Jo ingest all eight methadone pills. She admitted that Billie Jo had consumed additional methadone earlier that day. The next morning, Nelson discovered that Billie Jo had died. While police were at the house investigating, Darrah arrived. Nelson said Darrah whispered to her repeatedly: "You don't know where she got them from."

{¶7} On cross, Nelson admitted she loved Billie Jo and had been in a romantic relationship with her. She said she did not hold Darrah responsible for Billie Jo's death, but admitted she hates Darrah.

{¶8} Dr. James Mills, the Jefferson County Coroner, testified that his office examined Billie Jo's body on January 15, 2009. A toxicology screen was performed which revealed the presence of opiates along with extremely high levels of methadone and marijuana.

{¶9} Elizabeth, Billie Jo's mother, testified that on the way home from the hospital Darrah called her cell phone several times to speak with Billie Jo. She said she also called Billie Jo's house phone and that Darrah answered. When they arrived back at Billie Jo's home, Elizabeth dropped off Billie Jo, and picked up Jessica. Elizabeth watched as Billie Jo descended down the hill to her house. She lost sight of Billie Jo, however, and did not see her enter the house. Elizabeth denied seeing Darrah outside of

the house.

{¶10} Jessica, Billie Jo's eleven-year-old daughter testified she was at her mother's house with Nelson during the hospital trip. She confirmed that Darrah came to the house at that time and answered the landline phone while he was there. When she left the house she did not see Darrah outside.

{¶11} Brett Stillion, a pharmacist at the CVS Pharmacy in Martin's Ferry confirmed that a prescription for fifteen generic Vicodin pills was filled for Billie Jo on the evening of January 14, 2009.

{¶12} Billie Jo's sister, Rita, who is a phlebotomist and medical assistant by trade, said she saw the pills Billie Jo received from the pharmacy and recognized them as a form of Vicodin. Rita said she knew Darrah obtained drugs for Billie Jo many times in the past. Rita also testified she did not see anyone outside talking to Billie Jo when they dropped her off at home.

{¶13} Officer Sean Norman of the Wells Township Police testified that Darrah initially gave a verbal statement denying any involvement in the incident. However, Darrah subsequently told him he came to Billie Jo's house to purchase the Vicodin for twenty dollars. Darrah also admitted to trading his methadone for the Vicodin, but claimed that this took place outside the house and was done as a sham transaction to somehow prevent Nelson from discovering that Billie Jo had received cash from him. Darrah made a written statement to this effect. Officer Norman questioned Darrah about why a sham transaction was necessary if the money transaction supposedly took place outside and out of Nelson's presence. According to the officer, Darrah could provide no explanation for this.

{¶14} The defense called Darrah's brother and Billie Jo's cousin, Scott Darrah as a witness. Scott said that on January 14, 2009, between 3:00 and 4:00 PM, Billie Jo called him and offered to sell him methadone, and that he declined. On cross, Scott admitted he was convicted of possession of cocaine in Texas in 1996.

{¶15} Darrah's friend Kevin Belon then testified. He also claimed that Billie Jo called him on January 14, 2009 and told him she had methadone for sale. He said he had

received drug-related calls from Billie Jo in the past but had never purchased anything from her.

{¶16} Travis Taylor, a cousin of both, Billie Jo and Darrah, testified that Darrah was living at his house on January 14, 2009, and that he did not see Darrah possess or consume methadone pills at any time that day.

{¶17} Finally, the defense presented the testimony of Nicole Boggs, Darrah's girlfriend. Boggs stated she came to Billie Jo's house on January 14, 2009 with Darrah at around 6:30 PM. As they arrived, Boggs said she saw Billie Jo hand Darrah something outside. Boggs said she knew Billie Jo well and that Billie Jo would sometimes try to hide the extent of her drug use from Nelson. She said she had seen Billie Jo purchase drugs from others at her home many times.

{¶18} On cross, Boggs admitted she never saw Darrah pay Billie Jo any money for drugs on January 14, 2009. The prosecutor then presented Boggs with the voluntary written statement she made to police on February 5, 2009, which was admitted into evidence. In this account, Boggs states she knew Darrah had methadone when they went to Billie Jo's house that evening; that Billie Jo was waiting inside when they arrived; and that to her understanding Darrah was trading Billie Jo methadone for Vicodin. Boggs subsequently confirmed during her testimony that she knew Darrah intended to trade his methadone for Billie Jo's Vicodin because Darrah told her so. She agreed she never mentioned in her written statement to police that she saw Billie Jo hand something to Darrah outside Billie Jo's house. Boggs admitted she had a prior theft conviction.

{¶19} After hearing all the evidence, the trial court found Darrah not guilty on Count One (drug trafficking in marijuana), and guilty on Count Two (aggravated drug trafficking in methadone). Defense counsel filed a sentencing memorandum, and Darrah waived preparation of a presentence investigation. At the sentencing hearing, held on June 15, 2009, both defense counsel and Darrah himself made statements in mitigation of sentencing. Darrah pleaded with the court to order him to undergo drug treatment in lieu of a prison sentence.

{¶20} Ultimately, the trial court sentenced Darrah to a definite term of six months

imprisonment. The court imposed a lifetime weapons disability. The court also ordered that Darrah reimburse the State and County for costs of supervision, confinement and prosecution as authorized by law. The court advised Darrah that upon release from prison he may be subject to a period of post-release control for three years. The trial court denied Darrah's motion for stay pending appeal.

Manifest Weight

{¶21} In his first of two assignments of error, Darrah asserts:

{¶22} "The Court denied Appellant due process under the Fourteenth Amendment due to the fact that his conviction for drug trafficking was against the manifest weight of the evidence."

{¶23} Under a manifest-weight standard, the appellate court, "review[s] the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717. This court's discretionary power to grant a new trial is exercised only in the exceptional circumstance where the evidence weighs heavily against conviction. *Thompkins* at 387.

{¶24} Darrah was convicted of one count of aggravated drug trafficking pursuant to R.C. 2925.03(A)(1)(C)(1) which states:

{¶25} "(A) No person shall knowingly do any of the following:

{¶26} "(1) Sell or offer to sell a controlled substance;

{¶27} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶28} "(1) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. * * *" R.C. 2925.03(A)(1)(C)(1)

{¶29} Methadone is a Schedule II controlled substance pursuant to R.C. 3719.41, which puts it in the purview of Section (C)(1) supra. "Sale' includes delivery, barter, exchange, transfer, or gift, or offer thereof, and each transaction of those natures made by any person, whether as principal, proprietor, agent, servant, or employee." R.C. 3719.01(AA).

{¶30} There was ample evidence supporting the trial court's finding of guilt. Nelson testified that she personally witnessed Darrah trade eight methadone pills for Billie Jo's ten Vicodin pills. Nelson testified she was familiar with Vicodin because it had been prescribed to her in the past and was familiar with methadone because she often "managed" Billie Jo's methadone habit. Nelson's testimony to prove the identity of the substances was admissible pursuant to Evid.R. 701. See *State v. McKee* (2001), 91 Ohio St.3d 292, 297, 744 N.E.2d 737 (holding that a lay person may establish the identity of a drug in the absence of any laboratory testing so long as a proper foundation is laid).

{¶31} Further, Darrah's girlfriend Boggs testified that it was her understanding that Darrah's purpose in visiting Billie Jo that evening was to exchange his methadone for Billie Jo's Vicodin. The documentary evidence, which included Billie Jo's Vicodin prescription, Elizabeth's phone records, and Billie Jo's post-mortem toxicology report, supports the State's case against Darrah.

{¶32} The defense's theory of the case was that Darrah did not exchange methadone for Vicodin, but rather he paid cash for the Vicodin, thus making him a purchaser or possessor of drugs, not a trafficker. The defense relied on Darrah's verbal and written statements to police. Therein, Darrah claimed he paid Billie Jo twenty dollars for her Vicodin outside of her house, and that Billie Jo gave him the methadone with instructions to return it to her inside, in front of Nelson, as a "sham" transaction to prevent Nelson from discovering that Billie Jo had received cash. Boggs testified that she thought she saw Billie Jo give something to Darrah outside of Billie Jo's house when they arrived that night, but did not know if it was money. However, Boggs failed to mention this in her written statement to police. Moreover, Boggs' testimony is refuted by that of Rita, Elizabeth, and Jessica, all of whom stated they did not see Billie Jo meet with Darrah outside the house when she returned home. Further, as Officer Norman testified,

Darrah's story about the sham transaction simply does not make sense.

{¶33} The defense also presented several witnesses, all friends or relations of Darrah, who claimed that Billie Jo called them earlier that day and offered to sell them methadone. Apparently this testimony was intended to somehow create reasonable doubt that Billie Jo obtained methadone from Darrah and to support Darrah's theory that Billie Jo had methadone that day from some other source. However, their testimony does not necessarily disprove the allegation that Darrah later exchanged his methadone for Billie Jo's Vicodin.

{¶34} Based on the evidence adduced at trial we conclude there was no manifest injustice to the trial court's finding of guilt. Darrah's first assignment of error is meritless.

Sentencing

{¶35} In his second of two assignments of error, Darrah asserts:

{¶36} "The Court abused its discretion by sentencing Appellant to six months incarceration when the record reveals that a term of imprisonment is unreasonable."

{¶37} Based upon the Ohio Supreme Court's decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, appellate courts now review felony sentences under a two prong test. This court adopted the *Kalish* plurality analysis in *State v. Johnson*, 7th Dist. No. 09MA72, 2008-Ohio-6206.

{¶38} Under the first prong, appellate courts must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶26. To satisfy this prong, the trial court must consider the statutory sentencing factors in R.C. 2929.11 and R.C. 2929.12, and impose a sentence that is within the statutory range for the relevant offenses. *Id.* at ¶13-15. If the sentence is not clearly and convincingly contrary to law, an appellate court moves to the second prong, and determines whether the trial court abused its discretion in its application of the sentencing factors and resulting sentencing determination. *Id.* at ¶17, 19-20.

{¶39} With regard to the first prong, we conclude that Darrah's sentence was not clearly and convincingly contrary to law. The trial court expressly analyzed the sentencing

factors contained in R.C. 2929.11 and R.C. 2929.12. Further, the chosen sentence was within the statutory sentencing range. Darrah was convicted of one count of aggravated drug trafficking in methadone, pursuant to R.C. 2925.03(A)(1)(C)(1). The court could have imposed a community control sanction, or a prison term ranging from six to eighteen months. R.C. 2925.03(C)(1)(a); R.C. 2929.14(A)(4). The trial court sentenced Darrah to a prison term of six months, which is obviously within the permitted range.

{¶40} Moving on to the second prong, we conclude there was no abuse of discretion. While Darrah contends that the trial court's refusal to impose a community control sanction, such as drug treatment, was unreasonable, we disagree. The trial court thoroughly presented the reasoning behind its sentencing decision. The court first looked to the seriousness factors and found none that would make the crime more or less serious. The court then reviewed the recidivism factors and determined that recidivism was more likely because Darrah was on bail when the offense was committed, has a history of misdemeanor convictions, he failed to acknowledge a pattern of drug abuse, and showed no genuine remorse.

{¶41} As a result of these considerations, the trial court sentenced Darrah to a definite term of six months imprisonment. This is the shortest prison term the court could have imposed. This sentence was reasonable based on the facts and circumstances in this case. Just because Darrah may have benefitted from a community control sanction such as drug treatment does not mean the court was obligated to impose that sentence. Accordingly, Darrah's second assignment of error is meritless.

{¶42} In conclusion, both of Darrah's assignments of error are meritless. His conviction is not against the manifest weight of the evidence and sentence was neither contrary to law nor an abuse of discretion. Accordingly, the judgment of the trial court is affirmed.

Vukovich, P.J., concurs.
Waite, J., concurs.