**[Cite as *State v. Kinder*, 2010-Ohio-5173.]**

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-09-086

Appellee — Trial Court No. 2009CR0127

v.

Randolph Kinder — **DECISION AND JUDGMENT**

Appellant — Decided: October 22, 2010

* * * * *

Paula A. Dobson, Wood County Prosecuting Attorney, Melissa A. Freeman and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

George C. Rogers, for appellant.

* * * * *

OSOWIK, P.J.

**{¶ 1}** On December 10, 2008, appellant was a passenger in a van which was stopped by Wood County Sheriff Deputy Cris Klewer for having an expired license plate. The driver of the van, Francesca Simon, was found to be driving with an expired operator's license. Deputy Klewer ordered Simon to get out of the van and called a

towing company. Upon performing an inventory search, Klewer found a small silver pipe in a pocket behind the driver's seat, directly in front of the seat occupied by appellant. Appellant later told Detective Sergeant Michael Ackley that he owned the pipe and that he had placed it in the seat pocket. Subsequent tests performed on the pipe revealed the presence of a small amount of cocaine residue.

**{¶ 2}** On March 4, 2009, appellant was indicted by the Wood County Grand Jury on one count of possession of drugs, a fifth degree felony, in violation of R.C. 2925.11(A). Appellant entered a not guilty plea on March 20, 2009. On August 6, 2009, appellant filed a motion to suppress the statements he made to police on the night he was arrested. On September 17, 2009, following a hearing, the trial court denied appellant's motion to suppress. A jury trial was held on October 7, 2009, at which testimony was presented by Deputy Klewer; Detective Sergeant Terry James; Scott Dobransky, a chemist for the Ohio Bureau of Criminal Investigation ("BCI"); and Detective Ackley.

**{¶ 3}** Klewer testified at trial that he discovered a small silver pipe, which had "some kind of charred obstruction" at one end, while conducting an inventory search of the van. Klewer further testified that, after finding the pipe, he Mirandized[1] appellant, who proceeded to state that the pipe belonged to him and that he used it to smoke crack cocaine. On cross-examination, Klewer stated that the pipe was not in plain sight, however, it was in a seat pocket that was open at the top.

[1]*Miranda v. Arizona* (1966), 384 U.S. 436, 86 S .Ct. 1602, 16 L.Ed.2d 694.

**{¶ 4}** James testified at trial that he took the pipe to the BCI, where it remained until tests were conducted on September 15, 2009. Dobransky testified that he tested the pipe by rinsing it with a solvent, then testing the resulting sample, revealing the presence of a small "trace" or "residue" of cocaine.

**{¶ 5}** On cross-examination, appellant's attorney questioned Dobransky as to the prevalence of cocaine on United States currency. The prosecution objected to the introduction of such testimony. The defense then asked the trial court to take judicial notice of copies of several internet news articles that summarized scientific studies regarding the presence of cocaine in minute amounts on the majority of currency circulated in the United States. The prosecution objected on the basis that the issue was not relevant to the charge for which appellant was being tried.

**{¶ 6}** Ultimately, the trial court refused to allow appellant to introduce the internet news articles into evidence. Thereafter, Dobransky testified that the process for detecting microscopic cocaine crystals on currency differs from the process for determining the amount of cocaine residue on a crack pipe. He further testified that there may be 100 to 200, or even 1,000 times more cocaine on a crack pipe than on any particular paper bill.

**{¶ 7}** Ackely testified at trial that he went to the scene of appellant's arrest after hearing about the traffic stop on his police radio. After being told that appellant had been advised of his *Miranda* rights, Ackley spoke to appellant, who admitted that he owned the silver pipe. On cross-examination, Ackely stated that the cocaine on currency is in

powder form, and that it often is transferred when people package powdered cocaine and then handle currency while the powder is still on their hands. In contrast, residue forms in a pipe when crack cocaine is burned by smoking.

**{¶ 8}** At the close of Ackley's testimony, the prosecution rested. The defense then renewed its request to enter the news articles into evidence. The trial court responded that: (1) the presence of powder cocaine on currency is not relevant in a case involving crack cocaine residue on a silver pipe; and (2) the defense was offering only copies of new articles that summarized scientific studies, and not the actual studies. Ultimately, the trial court determined that the articles were not the proper subject of judicial notice. The defense was allowed to proffer the news articles into the record for purposes of appeal, but the articles were not allowed into evidence to be considered by the jury.

**{¶ 9}** Following the trial court's ruling on all evidentiary issues, the defense rested without presenting any witnesses. The case was then given to the jury which, after a short period of deliberation, found appellant guilty of one count of possession of cocaine, in violation of R.C. 2925.11(A), a fifth degree felony.

**{¶ 10}** On November 20, 2009, after a sentencing hearing, the trial court placed appellant on community control for three years; ordered him to complete a treatment program through the Northwest Community Corrections Center's Community Based Correctional Facility; to obtain a GED; and to pay the costs of his prosecution and a one-

time $50 supervision fee. The trial court also suspended appellant's driver's license for two years and imposed an 11 month, suspended prison sentence.

**{¶ 11}** A timely appeal was filed on December 14, 2009. On appeal, appellant sets forth the following assignment of error:

**{¶ 12}** "Assignment of error:

**{¶ 13}** "The trial court erred in refusing to take judicial notice of well known governmental [sic] sponsored studies that 90% of U.S. currency contains traces of cocaine, and in failing to hold that R.C. 2925.11(A) was therefore unconstitutionally overbroad."

**{¶ 14}** In support of his assignment of error, appellant first argues that the trial court erred by refusing to take judicial notice, pursuant to Evid.R. 201, of internet news articles reporting the results of scientific studies that conclude most United States currency contains detectable traces of cocaine. Appellant further argues that R.C. 2925.11(A) is "unconstitutionally overbroad" because the statute makes it possible to convict virtually anyone who carries paper currency of the crime of drug possession.

**{¶ 15}** As to appellant's first argument, generally, the trial court's decision to admit or exclude relevant evidence will not be overturned on appeal absent a finding of abuse of discretion. *State v. Greer*, 8th Dist. No. 92910, 2010-Ohio-1418, ¶ 10; *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961; State *v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was

unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

**{¶ 16}** With some exceptions, "[a]ll relevant evidence is admissible." Evid.R. 402. However, "[e]vidence which is not relevant is not admissible." Id. Evid.R. 401(A) defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

**{¶ 17}** Evid.R. 201 governs judicial notice of "adjudicative facts," i.e., the "facts of the case." *State v. Howard*, 12th Dist. No. CA2009-11-144, 2010-Ohio-2303, ¶ 20. A court may take judicial notice of any fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonabl[y] be questioned." Evid.R. 201(B). In this case, the trial court excluded the copied internet articles on two bases: (1) that the proffered evidence was not relevant; and (2) that it was inadmissible hearsay. We will examine each issue separately.

**{¶ 18}** Appellant was charged with one count of drug possession, pursuant to R.C. 2925.11(A), which states that:

**{¶ 19}** "(A) No person shall knowingly obtain, possess, or use a controlled substance. * * *

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

**{¶ 21}** "* * *

**{¶ 22}** "(4) If the drug involved in the violation is cocaine * * *, whoever violates division (A) of this section is guilty of possession of cocaine. * * *"

**{¶ 23}** Evidence was presented at trial that a silver pipe containing cocaine residue was found in Simon's van. Klewer and Ackley both testified that appellant stated the pipe belonged to him, and that he used it to smoke crack cocaine. No attempt was made by the state to accuse appellant of possessing U.S. currency that was contaminated with cocaine. In fact, Dobransky testified that the trace amounts of cocaine found on currency are composed of micro-crystals of cocaine in powder form, which is not the same as the crack cocaine residue found in the silver pipe. Accordingly, the trial court correctly concluded that evidence as to the prevalence of powdered cocaine on U.S. currency is not relevant to the issue of whether appellant's silver pipe contained crack cocaine residue.

**{¶ 24}** However, even if such evidence were relevant in this case, we have held previously that newspaper articles, which are analogous to the internet news articles proffered by appellant, "'are generally inadmissible as evidence of the facts stated within the article because they are hearsay not within any exception.'" *Consumer Portfolio Svcs., Inc. v. Staples*, 6th Dist. No. S-06-031, 2007-Ohio-1531, ¶ 28, quoting *State v. Self* (1996), 112 Ohio App.3d 688, 694. In *State v. Self*, supra, the Twelfth District Court of Appeals stated that the purpose of excluding hearsay testimony "is to avoid introducing statements that are unreliable because the out-of-court declarant cannot be cross-

examined and the triers of fact are unable to observe the declarant and determine whether his statement was worthy of belief." Id.

**{¶ 25}** For the foregoing reasons, the content of the internet news articles was inadmissible at trial. Accordingly, the trial court did not abuse its discretion by refusing to allow appellant to introduce them into evidence, and appellant's first argument is without merit.

**{¶ 26}** As to appellant's second argument, we note initially that "[a]n analysis of the constitutionality of a statute begins with the general premise that a statute is entitled to a strong presumption of constitutionality." *State v. Wear* (1984), 15 Ohio App.3d 77, 78, citing *Peebles v. Clement* (1980), 63 Ohio St.2d 314. The purpose of the overbreadth doctrine is to prohibit "'a statute from making innocent or constitutionally protected conduct criminal. * * * The harm from an overbroad statute is its chilling effect on constitutionally protected or otherwise lawful conduct.'" *State v. McCallion* (1992), 78 Ohio App.3d 709, 717, quoting *Record Revolution No. 6, Inc. v. Parma* (C.A.6, 1980), 638 F.2d 916, 927, vacated on other grounds (1981), 451 U.S 1013, 101 S.Ct. 2998, 69 L.Ed.2d 384, and (1982), 456 U.S. 968, 102 S.Ct. 2227, 72 L.Ed.2d 840. Ohio courts have held that a statute is not overbroad where is sets out both a prohibited course of conduct and a culpable mental state that applies to that particular conduct. See *State v. Wear*, supra, and *State v. McCallion*, supra.

**{¶ 27}** Ohio courts have held that that no minimum prohibited amount of a controlled substance is established by R.C. 2925.11. *State v. Carroll* (June 10, 1993), 8th

Dist. No. 62747, citing *State v. Newsome* (1990), 71 Ohio App.3d 73, 77. Accordingly, a jury could reasonably conclude that an accused violated R.C. 2925.11 by possessing cocaine residue. Id. However, for a criminal conviction to result, R.C. 2925.11 requires the trier of fact to find that the accused "knowingly" obtained, possessed, or used that substance. *State v. Newsome*, supra, citing *State v. Daniels* (1985), 26 Ohio App.3d 101. The mental state of "knowingly" is defined by R.C. 2901.22(B) as follows:

**{¶ 28}** "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

**{¶ 29}** On appeal, appellant asserts that R.C. 2925.11 is "constitutionally overbroad" because it is possible to convict virtually every American citizen of accidentally carrying cocaine-contaminated U.S. currency in his or her wallet at any given time. This argument must fail because it completely ignores the statutory requirement that the prohibited substance on such currency must have been "knowingly" obtained. Appellant's second argument is without merit.

**{¶ 30}** On consideration of entire record that was before the trial court and the law, this court finds that: (1) the trial court did not abuse its discretion by refusing to take judicial notice of the content of internet new articles offered into evidence by appellant; and (2) R.C. 2925.11 is not constitutionally overbroad since, to support a conviction, the

statute requires that even trace amounts of a prohibited substance be "knowingly obtained, possessed or used." Appellant's sole assignment of error is not well-taken.

**{¶ 31}** The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE