[Cite as *State v. McCree*, 2011-Ohio-1993.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-02-029 CA2010-02-030
- vs -	:	O P I N I O N
	:	4/25/2011
ERIC L. MCCREE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLES
Case No. CR2009-10-1793

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BRESSLER, J.

{¶1} Defendant-appellant, Eric McCree, appeals his conviction and sentence in the Butler County Court of Common Pleas for trafficking in cocaine and possession of cocaine.

{¶2} Appellant's convictions arose from two unrelated instances:

Trafficking in Cocaine

{¶3} Appellant's trafficking conviction stemmed from a May 22, 2008 interaction with Detective Joe Thompson. On that date, Thompson was undercover with a vice unit and

patrolling an area of Butler County for prostitutes and drug dealers. Thompson saw appellant and James "Gordy" Harris standing together on a street corner. Harris and Thompson nodded to one another and Harris approached the vehicle to see what Thompson wanted. Detective Thompson indicated to Harris that he wanted to purchase $40 worth of crack cocaine. Harris informed Detective Thompson that he did not have the crack on him. Detective Thompson stated that he would not pay until he received the crack. Harris then went back to confer with appellant. Appellant subsequently approached Detective Thompson's vehicle and inquired as to what Thompson wanted. When Thompson told appellant he wished to purchase $40 worth of crack, appellant replied, "I got you, dude[.] [M]y dude will serve you up." Detective Thompson then handed the money to appellant and appellant and Harris walked to a nearby vehicle. Thereafter, appellant retrieved a baggie and handed it to Harris. Harris then gave the crack to Detective Thompson.

{¶4} Due to the proximity of the transaction site to Jefferson Elementary School, appellant was charged with trafficking in cocaine within the vicinity of a school or juvenile, a felony of the fourth degree. Appellant's charge of trafficking in cocaine was tried before a jury in the Butler County Court of Common Pleas. The jury returned a verdict finding appellant guilty.

Possession of Cocaine

{¶5} On October 3, 2009, an anonymous caller reported a suspected hand-to-hand drug transaction. The caller indicated that a black male and a young white female had been standing on a corner and made a hand-to-hand transaction with the occupants of a silver vehicle. According to the caller, the black male and young white female would be sitting on a nearby stoop and the black male appeared to have narcotics in a cellophane baggie. Responding officers found appellant and a young white female at the scene. Among those to respond was Officer Eric Fryman who asked appellant if it would be alright if he searched him

for narcotics. Appellant informed Officer Fryman that he no longer sold narcotics and that the officer could check him any time he wanted. Appellant further stated that if he was still involved in narcotics trafficking he would not be foolish enough to keep the contraband on his person. Appellant then consented to a pat-down, which did not reveal any contraband. Appellant subsequently consented to another pat-down, which also proved fruitless. Throughout this time, Officer Chris Gibson talked with the young white female. After the second pat-down, Officer Gibson informed Officer Fryman that the young white female had told him that appellant had hidden the cellophane baggie containing the narcotics down his pants. Officer Fryman consequently requested that appellant remove or undo his belt. Appellant verbally refused to do so but immediately thereafter consented to another pat-down. During this final pat-down, Officer Fryman ran his hands under appellant's stomach along his waistline and felt a cellophane baggie tucked behind appellant's belt. However, appellant's belt was cinched down to the point where Officer Fryman had to loosen it to retrieve the baggie. The baggie was removed and appeared to contain crack cocaine. Appellant was arrested on the scene and charged with possession of cocaine.

{¶6} Appellant moved to suppress the evidence discovered by Officer Fryman. The trial court found appellant consented to the pat-downs and denied the motion. Appellant then entered a plea of no contest to possession of cocaine.

{¶7} The trial court sentenced appellant to 17 months in prison for trafficking in cocaine and a consecutive six-month prison term for possession of cocaine.

{¶8} The convictions were treated as separate cases by the trial court but have been consolidated for appeal.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE WHEN THE SEARCH EXCEEDED THE CONSENT GIVEN BY MR. MCCREE."

{¶11} In his first assignment of error, appellant contends the trial court should have suppressed the evidence obtained by officers following a pat-down of his person.

{¶12} Under the Fourth Amendment to the United States Constitution, citizens have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ***." Nevertheless, exceptions exist to these protections. *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507. Among these exceptions is a search conducted pursuant to a suspect's consent. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 220, 93 S.Ct. 2041. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness-what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno* (1991), 500 U.S. 248, 251, 111 S.Ct. 1801.

{¶13} Consent to a search may be limited in scope or revoked at any time, even after the search has begun. *State v. Riggins*, Hamilton App. No. C-030626, 2004-Ohio-4247, ¶27. However, "a suspect who has voluntarily consented to a search of his person for drugs may effectively withdraw his consent only by unequivocal conduct, in the form of an act, a statement, or some combination of the two, that is inconsistent with the consent previously given, and that, to an objective person, would reasonably communicate the withdrawal of consent." Id. at ¶36. Naturally, "an equivocal act or statement cannot reasonably be interpreted as conveying an indication that consent has been withdrawn." *Burton v. United States* (C.A.D.C.1994), 657 A.2d 741, 747. The state bears the burden of proof to demonstrate that the suspect voluntarily consented to a search and that the search was performed within the scope of that consent. *State v. Mack* (1997), 118 Ohio App.3d 516, 520.

{¶14} On appeal, appellant asserts that he never "grant[ed] consent to search his person once let alone three times ***." Nevertheless, the credibility of witnesses on a motion

to suppress is within the domain of the trial court and should not be second-guessed by a reviewing court. *State v. Foster* (1993), 87 Ohio App.3d 32, 42. In this case, the trier of fact found the testimonies of Officers Fryman and Gibson to be more credible than that of appellant.

{¶15} Officer Fryman testified that he patted appellant down three times and that prior to the first two pat-downs appellant consented to the procedure. Preceding the third pat-down, Officer Fryman asked appellant to undo his belt. While appellant verbally indicated unwillingness to undo his belt, he immediately thereafter consented to another pat-down without giving limiting instructions. Appellant did not verbally limit the scope of consent to areas other than his waistline, nor did he contest when Officer Fryman began undoing the belt himself. Likewise, appellant took no physical action which would have indicated revocation of the consent given prior to the third pat-down. See *State v. Jordan* (Mar. 31, 1995), Clark App. No. 94-CA-55 (suspect blocking policeman's access to his pocket constituted revocation of consent). Thus, we find that appellant's conduct fell short of a reasonably unequivocal revocation of consent and find no error in the trial court's denial of appellant's motion to suppress evidence.[1]

{¶16} Appellant's first assignment of error is therefore overruled.

{¶17} Assignment of Error No. 2:

{¶18} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN MR. MCCREE'S CONVICTION FOR TRAFFICKING IN COCAINE."

{¶19} Appellant asserts that the evidence presented by the state is insufficient to

1. We note that Officer Gibson testified at the motion to suppress hearing that he informed Officer Fryman that the young white female indicated appellant had drugs in his pants. In its opposition to appellant's motion to suppress, the state argued that this gave Officer Fryman probable cause to search appellant for the drugs. However, the trial court did not grant the motion to suppress on this basis, nor did either party address this issue on appeal. Accordingly, we decline to conduct a probable cause analysis.

support a conviction for trafficking in cocaine or, in the alternative, that the conviction was against the manifest weight of the evidence presented.

{¶20} Sufficiency is a test of adequacy and the reviewing court must determine "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. "In reviewing a challenge to the sufficiency of the evidence, 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." *Baberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, ¶14. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶21} In contrast to a challenge of sufficiency of the evidence, "a manifest weight challenge concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶28. The relevant inquiry under a manifest weight challenge is "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." Id. However, reversal of a case on weight of the evidence is only ordered in exceptional circumstances. *Thompkins*, 78 Ohio St. 3d at 387.

{¶22} "An appellate court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses." *Moshos*, 2010-Ohio-735 at ¶28. Nonetheless, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 231. "[I]n other words, although an appellate court must act as a 'thirteenth juror' when considering

whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility." *State v. Jackson*, Jefferson App. No. 09 JE 13, 2009-Ohio-6407, ¶18.

{¶23} Sufficiency of the evidence and weight of the evidence are quantitatively and qualitatively different. Id. at 386. "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *Moshos*, 2010-Ohio-735, ¶29, quoting *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73. Thus, a court's finding that a conviction is supported by the manifest weight of the evidence disposes of a challenge to the sufficiency of the evidence. Id.

{¶24} The statute under which appellant was convicted prohibits a person from knowingly selling or offering to sell a controlled substance. R.C. 2925.03(A)(1)(a).[2] However, to establish trafficking under R.C. 2925.03(A)(1), the state is not required to prove the defendant actually possessed a controlled substance. *State v. Cabrales*, Hamilton App. No. C-050682, 2007-Ohio-857, ¶41. Rather, a conviction may be sustained by simply proving the defendant declared his readiness or willingness to sell a controlled substance for acceptance or rejection. Id.

{¶25} Detective Thompson testified at the trial as to the interaction between himself and appellant on May 22, 2008. In his testimony, Detective Thompson stated that appellant asked what he wanted and responded, "I got you, dude," when Thompson indicated that he wished to purchase $40 worth of crack cocaine. Furthermore, Thompson testified that he handed the purchase money directly to appellant after asking for the crack. Appellant's

2. The Ohio Revised Code defines "controlled substance" as "a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V." R.C. 3719.01(C). Pursuant to R.C. 2925.01(A), this definition of controlled substance applies to drug offenses. Cocaine is classified as a schedule II controlled substance. R.C. 3719.41(A)(4).

actions displayed his readiness and willingness to sell crack to Detective Thompson and we therefore cannot say that the jury clearly lost its way in returning a guilty verdict. While Thompson was the only witness to testify as to the interaction between appellant and himself, the trier of fact found him to be credible and the record does not indicate any evidence to the contrary.

{¶26} The state likewise presented the testimony of Brian Scowden of the Hamilton County Crime Lab. Scowden testified that the evidence the lab received in appellant's trafficking case showed the recovered substance to be .35 grams of crack cocaine.

{¶27} Furthermore, we find no error in appellant's conviction of trafficking in cocaine as a felony of the fourth degree.

{¶28} Trafficking in cocaine becomes a felony of the fourth degree when committed in the vicinity of a school or in the vicinity of a juvenile. R.C. 2925.03(C)(4)(b). "An offense is 'committed in the vicinity of a school' if the offender commits the offense on school premises, in a school building, or within one thousand feet of the boundaries of any school premises, regardless of whether the offender knows the offense is being committed on school premises, in a school building, or within one thousand feet of the boundaries of any school premises." R.C. 2925.01(P). A "school" is defined as "any school operated by a board of education, any community school established under Chapter 3314 of the Revised Code, or any nonpublic school for which the state board of education prescribes minimum standards under section 3301.07 of the Revised Code, whether or not any instruction, extracurricular activities, or training provided by the school is being conducted at the time a criminal offense is committed." R.C. 2925.01(Q).

{¶29} At trial, the state proffered the testimony of Joani Copas, director of communications for the Hamilton City School District. Copas testified that on May 22, 2008, Jefferson Elementary School was open and operating as a school.

{¶30} Mike Wright, an employee of the Geographical Information Services Division of the Butler County Auditor's Office, further testified that the location where Detective Thompson and appellant negotiated for the purchase of the crack was within a 1,000-foot radius of Jefferson Elementary.

{¶31} Based upon the testimony of these witnesses, the jury was presented with adequate evidence to find that appellant was within 1,000 feet of a school when he offered to sell Thompson the crack, thus warranting conviction of a felony of the fourth degree.

{¶32} Appellant's second assignment of error is overruled.

{¶33} Assignment of Error No. 3:

{¶34} "THE COURT ERRED IN SENTENCING MR. MCCREE CONTRARY TO LAW BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE FINDINGS SET FORTH IN R.C. 2929.14(E)(4)."

{¶35} In appellant's third assignment of error, he argues that the trial court was required to make the findings set forth in R.C. 2929.14(E)(4) before imposing consecutive sentences and that failure to do so constituted reversible error.

{¶36} In *State v. Foster*, 109 Ohio St.3d, 2006-Ohio-856, the Ohio Supreme Court found sections of Ohio's felony sentencing statutes, R.C. 2929.14(E)(4) and R.C. 2929.41(A), unconstitutional. In deciding *Foster*, the Ohio Supreme Court held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at ¶100. However, appellant asserts the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, overruled *Foster* and consequently revived the requirements of R.C. 2929.14(E)(4).

{¶37} The Ohio Supreme Court recently rejected the contention that the decision in *Ice* revived R.C. 2929.14(E)(4). *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6820. "[T]he

decision of the United States Supreme Court in *Oregon v. Ice* does not revive Ohio's former consecutive sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*. Because the statutory provisions were not revived, trial judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." Id. at ¶39.

{¶38} In accordance with the Ohio Supreme Court's recent holding in *Hodge*, appellant's third assignment of error is overruled.

{¶39} The judgment of the trial court is affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

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