

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

State of Ohio

Court of Appeals No. H-07-031

Appellee

Trial Court No. CRI 2006 0728

v.

Larry Wendell Owens

DECISION AND JUDGMENT

Appellant

Decided: November 21, 2008

* * * * *

Russell Leffler, Huron County Prosecuting Attorney, and
Richard R. Woodruff, Assistant Prosecuting Attorney, for appellee.

Laura A. Perkovic, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This case is before the court on appeal from a judgment of the Huron County Court of Common Pleas, wherein appellant, Larry W. Owens, was found guilty by jury of Count 1, trafficking in drugs, in violation of R.C. 2925.03(A)(1) and (C)(4)(c), a felony of the fourth degree, Count 2, trafficking in drugs, in violation of R.C. 2925.03(A)(1) and (C)(4)(a), a felony of the fifth degree, Count 3, trafficking in drugs, in violation of R.C. 2925.03(A)(1) and (C)(4)(a), a felony of the fifth degree, and Count 4,

trafficking in drugs, in violation of R.C. 2925.03(A)(1) and (C)(4)(b), a felony of the fourth degree. Appellant was sentenced on January 19, 2007, to serve concurrent terms of 17 months on Count 1, 11 months on Count 2, 11 months on Count 3, and 17 months on Count 4. For the reasons set forth below, the judgment of the trial court is affirmed.

{¶ 2} This case involved four controlled purchases of cocaine and crack cocaine from appellant by confidential informant James Grossbeck. Grossbeck, a long-time drug user, worked under the direction of Captain Robert McLaughlin of the Huron County Sheriff's Office and Patrolman John Herrington of the New London Police Department. In exchange for his services, Grossbeck was not prosecuted for passing bad checks, was given a cash payment of \$50 for each controlled buy, was given an apartment, rent of \$400 per month fully paid, and was given a mobile phone.

{¶ 3} Grossbeck had known appellant for approximately two years and knew that he could purchase drugs from him. The police instructed Grossbeck to make several controlled purchases from appellant and at least two other individuals. Immediately prior to each controlled buy, Grossbeck had a digital recording device placed on his person, was issued money with which he was to purchase drugs, and both he and his automobile were searched by Patrolman Herrington.

{¶ 4} The controlled buys were made at appellant's residence at 2558 Jennings Road, New London, Ohio, as follows: on May 3, 2005, Grossbeck purchased 1.22 grams of crack cocaine from appellant; on May 26, 2005, Grossbeck purchased 0.46 grams of cocaine from appellant; on July 16, 2005, Grossbeck purchased 0.079 grams of cocaine

from appellant; and on July 24, 2005, Grossbeck purchased 0.18 grams of crack cocaine from appellant, in the vicinity of a juvenile.

{¶ 5} Appellant was indicted on July 14, 2006, and jury trial commenced on December 12, 2006. At trial, Grossbeck stated that he was a long-time drug user and that his drug of choice was opiates. Grossbeck noted that he stopped using drugs in 2005, after the death of a close friend. Grossbeck admitted that, at the behest of the police, he purchased cocaine and crack cocaine from appellant on four separate occasions. Appellant was found guilty in Counts 1, 2, and 4. In Count 3, appellant was found guilty; however, the jury did not find that the offense was committed in the vicinity of a juvenile.

{¶ 6} On November 15, 2007, appellant was granted leave to file a delayed appeal. Appellant appeals his conviction and asserts the following sole assignment of error:

{¶ 7} "The verdict of the jury finding appellant guilty of drug trafficking is against the manifest weight of the evidence, in violation of appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 16 of the Ohio Constitution."

{¶ 8} Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Applying the "sufficiency of the evidence" standard, a reviewing court determines whether the evidence submitted is legally sufficient to support all elements of the offense charged. *Id.*, superceded by constitutional amendment on other

grounds as stated by *State v. Smith* (1997), 80 Ohio St.3d 89. Specifically, we must determine 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.

{¶ 9} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. Upon review, an appellate court must consider all of the evidence produced at trial, and in order to overturn a conviction, must find that the jury clearly lost its way and created a "manifest miscarriage of justice." *Thompkins* at 387. In effect, the appellate court sits as a "thirteenth juror" and "disagrees with the factfinder's resolution of the conflicting testimony." *Id.* To overturn a verdict as against the manifest weight, the jury must have "clearly lost its way and created such a miscarriage of justice" that the verdict must be reversed. *State v. Martin* (1983), 20 Ohio App.3d 172, paragraph three of the syllabus. The standard is difficult to meet, as the rule is necessary "to preserve the jury's role with respect to issues surrounding the credibility of witnesses." *Thompkins* at 389; and *State v. Dehass* (1967), 10 Ohio St.2d 230, 231. A conclusion that convictions are not against the manifest weight of the evidence necessarily encompasses a conclusion that the convictions are supported by sufficient evidence.

{¶ 10} In his sole assignment of error, appellant contends that his convictions for drug trafficking were against the manifest weight of the evidence. Appellant asserts that his drug trafficking convictions should be reversed because Grossbeck, the state's only eyewitness to the alleged drug transactions, lacked credibility. Further, appellant argues that Grossbeck was motivated to claim that appellant was trafficking in drugs because he was offered immunity from prosecution for passing bad checks, was given an apartment, rent of \$400 per month fully paid, was given a cash payment of \$50 for each controlled buy, and was given a mobile phone. Appellant relies on *State v. Chapman*, 9th Dist. No. 07-CA-9161, 2008-Ohio-1452, ¶ 30, wherein the Ninth District Court of Appeals noted that "the government cannot, consistent with due process, offer favorable treatment to a prosecution witness contingent upon the success of the prosecution. Such an agreement is nothing more than an invitation to perjury having no place in our constitutional system of justice."

{¶ 11} The Supreme Court of Ohio has held that "[i]n either a criminal or a civil case the weight to be given to the evidence and the credibility of witnesses are primarily for the trier of the facts." *DeHass* at 231. Based on a thorough review of the record, this court finds it is reasonable that the jury could have believed the testimony and evidence proffered by the state. Appellant was charged with four counts of drug trafficking. There is no dispute regarding appellant's intent, or that the drugs in question were cocaine and crack cocaine. The dispute is whether appellant was actually the person who sold the cocaine and crack cocaine to the informant, Grossbeck.

{¶ 12} Grossbeck testified that he had purchased the drugs from appellant at the request of the police. Grossbeck identified appellant in court. All of the controlled buys were made at appellant's home. Digital recordings of the four controlled buys were preserved and played for the jury at trial. Grossbeck was searched both before and after each controlled buy, and was issued money with which to purchase drugs. Grossbeck described the events of the drug buys with reasonable detail. Grossbeck admitted that he was a former drug-user, that he spent time in jail for failure to pay traffic fines, that he was paid by the police to perform these controlled buys, and that he had done this for the police on other occasions. On cross-examination, appellant emphasized that Grossbeck was offered immunity in prosecution for passing bad checks, was paid \$50 for each controlled buy, was given an apartment with a \$400 rent fully paid, and was given a mobile phone.

{¶ 13} The present case is distinguishable from *Chapman*, supra, wherein the state of Ohio was found to have committed prosecutorial misconduct and deprived the defendant of a fair trial when they offered a co-defendant a considerably lesser sentence in a plea agreement if his testimony resulted in a successful conviction of defendant. The Ninth District Court of Appeals agreed with the decision in *U.S. v. Waterman*, 732 F.2d 1527, 1533 (8th Cir.Neb.1984), wherein the Eight Circuit Court of Appeals held "due process cannot be interpreted to allow the government to *reward its witnesses based upon the results of their testimony*. There simply is no reason to offer a witness favorable treatment for anything other than truthful cooperation in the government's quest for

justice." (Emphasis added). Our review of the record indicates that Grossbeck approached the police about becoming a confidential informant, that he agreed to work as a confidential informant in exchange for immunity in prosecution for passing bad checks, and that he arranged several controlled buys with appellant and other individuals. However, the record does not indicate that Grossbeck's immunity was contingent upon appellant's conviction.

{¶ 14} Upon our review, we find that the state presented a reasonable and coherent version of the events, and that appellant's convictions were supported by sufficiently reasonable and believable evidence. Although appellant's assertions may diminish the credibility of Grossbeck, the record demonstrates that these assertions were fully disclosed to the jury. Grossbeck was present to testify at trial and was subjected to full cross-examination by appellant. Further, the trial court thoroughly instructed the jury as to its role in evaluating the credibility of each witness.

{¶ 15} This court finds it reasonable that the jury believed the state's version of the events and convicted him based on the evidence, and concludes that appellant's criticism is inadequate to prove that the jury lost its way or that the convictions constituted a manifest miscarriage of justice. Therefore, this court finds that the convictions are not against the manifest weight of the evidence. Accordingly, we find that appellant's sole assignment of error is found not well-taken.

{¶ 16} On consideration whereof, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant

to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Huron County.

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, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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