

1992 Ohio App. LEXIS 6680, *

STATE OF OHIO Plaintiff-Appellee v. JESSE GAMBOA Defendant-Appellant

Case No. CA-776

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, MORROW COUNTY

1992 Ohio App. LEXIS 6680

December 28, 1992, Entered

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas.
Case No. 3349

DISPOSITION: JUDGMENT: Affirmed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant sought review of a judgment of the Court of Common Pleas of Morrow County (Ohio), which convicted him, upon a jury verdict, of violating [Ohio Rev. Code Ann. § 2925.03\(A\)\(4\)](#) for trafficking in marijuana. Defendant contended that the trial court erred in admitting the marijuana into evidence when a proper chain of custody was not established and that there was insufficient evidence to conclude that he intended to possess marijuana.

OVERVIEW: Law enforcement officers searched defendant's automobile pursuant to a warrant and discovered a bag of what later tested positive as marijuana. Defendant appealed from his trafficking conviction. The court found that the marijuana offered at trial was sufficiently identified by the testimony of the officers and the crime laboratory director. Although the evidence officer did not testify, the court held that: (1) it was evident from the testimony that a proper chain of custody was established; (2) the State bore the burden of establishing a proper chain of custody, but the State needed only to establish that it was reasonably certain that substitution, alteration, or tampering did not occur; and (3) breaks in the chain of custody went to the weight, not the admissibility, of the evidence. In affirming defendant's conviction, the court further found that there was sufficient, credible evidence on each material element of the criminal offense of trafficking in marijuana, which, if believed, would have convinced the average mind of defendant's guilt beyond a reasonable doubt and that circumstantial evidence did not have to be irreconcilable with any reasonable theory of innocence.

OUTCOME: The court affirmed the trial court's judgment, and it remanded the cause to the trial court for execution of defendant's sentence.

CORE TERMS: marijuana, bag, assignment of error, chain of custody, innocence, reasonable doubt, irreconcilable, circumstantial evidence, guilt beyond, trafficking, convince, execution of sentence, reasons stated, ziplock

LexisNexis(R) Headnotes ♦ [Hide Headnotes](#)

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HN1  Although the State bears the burden of establishing a proper chain of custody, that duty is not absolute. The State need only establish that it is reasonably certain that substitution, alteration or tampering did not occur; breaks in the chain of custody go to the weight, not the admissibility, of the evidence. [More Like This Headnote](#)

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HN2  Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the State relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. [More Like This Headnote](#)

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HN3  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 the crime proven beyond a reasonable doubt. [More Like This Headnote](#)

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^{HN4} [Ohio Rev. Code Ann. § 2925.03\(A\)\(4\)](#) states that no person shall knowingly possess a controlled substance in an amount equal to or exceeding the bulk amount, but in an amount less than three times that amount. [More Like This Headnote](#)

COUNSEL: For Plaintiff-Appellee: HOWARD E. HALL, Prosecuting Attorney, Morrow County Courthouse, 48 East High Street, Mt. Gilead, Ohio 43338.

For Defendant-Appellant: **PAUL CROUSHORE**, 601 South High Street, Columbus, Ohio 43215.

JUDGES: Hon. William B. Hoffman, P.J., Hon. Norman J. Putman, J., Hon. Earle E. Wise, J. Ret. (From the Fifth Appellate District, Sitting by Supreme Court Assignment)

OPINIONBY: NORMAN J. PUTMAN

OPINION: OPINION

PUTMAN, J.

This is an appeal from a judgment of conviction and sentence entered upon a jury verdict of guilty of trafficking in marijuana, a violation of [R.C. 2925.03\(A\)\(4\)](#).

Defendant-appellant, Jesse Gamboa (appellant), assigns the following as error:

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE TO BE PRESENTED TO THE JURY WHICH WAS NOT RELEVANT, WHERE THE CHAIN OF CUSTODY DID NOT INCLUDE THE OFFICER WHO COLLECTED AND SEALED THE EVIDENCE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED WHEN IT HELD THAT THERE WAS SUFFICIENT EVIDENCE FOR A REASONABLE JUROR TO CONCLUDE THAT APPELLANT INTENDED [***2**] TO POSSESS MARIJUANA.

For the reasons stated below, appellant's assignments of error are overruled.

On January 15, 1992, officers of the Morrow County Sheriff's Department and the Mansfield Police Department searched appellant's automobile pursuant to a warrant. The officers discovered a ziplock bag containing green vegetation which later tested positive as marijuana.

I

By his first assignment of error, appellant argues that the trial court erred in admitting the marijuana into evidence when a proper chain of custody was not established. Appellant asserts that because Deputy Gary Bill, evidence officer from the Morrow County Sheriff's Department, did not testify at trial, there was no

evidence establishing that the bag of marijuana was sealed or where the bag was kept during the first two days after it was confiscated.

^{HN1} "Although the state bears the burden of establishing a proper chain of custody, that duty is not absolute. The state need only establish that it is reasonably certain that substitution, alteration or tampering did not occur; breaks in the chain of custody go to the weight, not the admissibility, of the evidence." [State v. Blevins \(1987\), 36 Ohio App.3d \[*3\] 147.](#)

Upon our review of the record, we find that the marijuana offered at trial was sufficiently identified by the testimony of Officer Richard Duffy, Deputy Sheriff Michael Morrow, and Anthony Tambasco, laboratory director of the Mansfield Police Department Crime Lab. Officer Duffy identified State's Exhibit 3, a plastic bag containing marijuana, as the same bag that he found during the search of appellant's car. T.25-28. Deputy Morrow also identified State's Exhibit 3 as the same bag of marijuana found in appellant's car. T.40. Officer Morrow testified that evidence officer Deputy Bill collected the bag of marijuana at the scene and then signed it over to Deputy Morrow for submission to the Mansfield Police Department Crime Lab. T.40. On January 17, 1992, Deputy Morrow gave the evidence to lab director Anthony Tambasco for analysis. T.40-41, 62. Mr. Tambasco tested the substance contained in the ziplock bag and concluded that it was marijuana. T.67. Mr. Tambasco also testified at trial that State's Exhibit 3 was in the same condition that he last saw it before returning it to Deputy Morrow. T.62. On January 24, 1992, Deputy Morrow picked the bag up from the crime lab [*4] and secured it in his office until trial. T.41, 68.

It is evident from the foregoing testimony that a proper chain of custody was established. Accordingly, appellant's first assignment of error is overruled.

II

By his second assignment of error, appellant argues that there was insufficient evidence for the jury to conclude that he intended to possess marijuana. Appellant cites [State v. Kulig \(1974\), 37 Ohio St.2d 157.](#) for the proposition that although possession may be constructive, it must be irreconcilable with any reasonable theory of the accused's innocence. Appellant contends that the evidence presented to the jury was reconcilable with a reasonable theory of innocence (some third party placed the marijuana in appellant's car; see p.9 of appellant's brief), and therefore the trial court should have granted appellant's motion for acquittal.

In overruling [Kulig, supra.](#) the Ohio Supreme Court stated:

^{HN2} "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there [*5] is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.

[State v. Jenks \(1991\), 61 Ohio St.3d 259.](#) paragraph one of the syllabus.

In [Jenks, supra.](#) the Ohio Supreme Court also defined the role of the appellate court when reviewing sufficiency claims:

^{HN3} ¶ 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 the crime proven beyond a reasonable doubt. ([Jackson v. Virginia \[1979\], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560](#), followed.)

[Jenks, supra](#), paragraph two of the syllabus.

Appellant was charged with violating [R.C. 2925.03\(A\)\(4\)](#), which states:

^{HN4} ¶ No person shall knowingly do any of the following:

. . .

Possess a controlled substance in an amount equal [***6**] to or exceeding the bulk amount, but in an amount less than three times that amount;

Upon careful review of the record before us, we find sufficient, credible evidence on each material element of the criminal offense of trafficking in marijuana. This evidence, if believed, would convince the average mind of appellant's guilt beyond a reasonable doubt. Because circumstantial evidence need not be irreconcilable with any reasonable theory of innocence, we find no merit to appellant's argument and overrule his second assignment of error.

For the foregoing reasons, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed and this cause is remanded to that court for execution of sentence.

Hoffman, P.J. and

Wise, J. concur.

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Morrow County, Ohio, is affirmed and this cause is remanded to that court for execution of sentence.

Norman J. Putman

William B. Hoffman

Earle E. Wise

JUDGES