THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	CASE NO. CR 436635
Plaintiff	)	
	)	MEMORANDUM OF OPINION
vs	)	AND ORDER
EDWAN ADAMS	)	
Defendant	)	

FRIEDMAN, J.:

¶1. In this case the defendant was charged with two felony counts: trafficking in a controlled substance: marijuana[1], in an amount of less than 200 grams, and possession of criminal tools. Defendant having waive d his right to a trial by jury, the case proceeded to a trial to the Court. At the conclusion of the State's case, the Court granted defendant's motion for a directed verdict of acquittal as to the second count. Following defendant's presentation the Court delivered its decision, finding that the State had failed to establish beyond a reasonable doubt all the elements of drug trafficking, but that it had met its burden of proof as to the lesser and included offense of possession of marijuana, a minor misdemeanor. What follows is an elaboration of the Opinion delivered orally at the close of trial, July 8, 2003.

¶2. Ohio law declares that mere possession of less than 100 grams of marijuana is a minor misdemeanor, while trafficking in any amount of that drug is a fifth-degree felony. The law further defines "trafficking" to include not only the sale but also to: "prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

According to the American Heritage Dictionary, "marijuana" is the preferred form in English, while "marihuana" is the correct Spanish term. Nonetheless, while the Ohio Revised Code refers to marihuana", most Ohio case law seems to prefer "marijuana". This Court would welcome some consistency, and can understand why the street avoids confusion by referring either to "weed" or "grass".

¶3. It is undisputed that, at the time of his arrest, the defendant was a passenger n an automobile, and further that he was in possession of ten small plastic bags, which con-ained a total weight of just over twenty grams of marijuana. There was no evidence of any ther factors that might support a charge that the defendant at that time was selling, or in-ended to sell, any of the marijuana.

¶4. Of course, it is reasonable to conclude that, being a passenger in the vehicle, while in possession of a controlled substance, constitutes "transporting" that substance un-der the statute. The sole issue before the Court, therefore, is whether the circumstances, aken as a whole, support the conclusion, beyond a reasonable doubt, that the defendant knew or should have known that these bags of marijuana were intended for sale, or resale, by himself or someone else.

¶5. Case law on this point is not very instructive. In *State v. Freeman* (App. 8 Dist. 995), 1995 WL 693110, the defendant was found to have in his possession a bag containing 8 individually-packaged bags of cocaine. Although the court of appeals held that this would support a finding of drug trafficking, it is noteworthy that also found on the defen-dant's person were two pagers and $441, and that a "search of his vehicle produced a num-ber of empty plastic bags identical to those found on his person." Although not otherwise discussed in the opinion, this clearly constituted corroborative evidence to support the con-clusion that the drugs were not intended for personal consumption. Similarly, in *State v.* Banks (8th Dist. App. 1995), 1995 WL 32859, the defendant was arrested while carrying a bag with three large rocks and three smaller rocks of crack cocaine, along with $375 cash, a pager, and a cellular telephone. The court of appeals again sustained a guilty verdict, noting all the circumstances in the case. In *State v. Smith* (8th App. Dist. 1996), 1996 WL 100965, the appellant was stopped in an area of the city known for a heavy concentration of drug traf-ficking, and an inventory of the car disclosed forty individually wrapped packets of heroin in the console between the front seats. Finally, in *State v. Gates* (8th Dist. App. 2001), 2001 WL 534163, the defendant was arrested while carrying "eight individually packaged bags of marijuana" in his jacket pocket. Cleveland Police Detective, testifying based upon twenty years' experience, sated that it is "not usually common" for a person to carry eight nickel bags for his own personal consumption. The court of appeals sustained the conviction, not-

ing that "the jury could, considering the circumstantial evidence of Gates' possession of eight 'nickel' bags of marijuana as well as Detective Gajowski's testimony, have found all the essential elements of preparing the marijuana for sale."

¶6. In this case the sole witness for the State, the arresting officer, testified that the police have what he referred to as a "rule of thumb": that persons who possess one to three baggies of marijuana intend to consume it themselves, and that anyone possessing nine or more baggies is instead trafficking. He did not state the source for this rule of thumb, nor did the State provide any empirical or other scientific studies to support it. That it seems on its face to be a reasonable conclusion is both obvious and beside the point. A rule of thumb devised by unknown police officers is at best shaky ground upon which to construct a conviction beyond a reasonable doubt.

¶7. The Court finds that the rule of thumb testified to in this case may be a useful tool in evaluating where to draw a line that the statute leaves vague; however, it remains nothing more than a tool and should be used with discretion in analyzing all the evidence before the trier of fact. If such rule of thumb is to be accepted, therefore, it must be merely for the purpose of establishing a rebuttable presumption as to the intention of the defendant.

¶8. In the case *sub judice*, the defendant's testimony established that he routinely smokes marijuana on a daily basis, that he does not drive or have ready access to transportation, and that he depends upon his "step-uncle" (the driver of the vehicle) and others to take him to where he can purchase his regular supply of marijuana. Because of this, he stated, he intended to purchase not simply a one-day's supply of the drug, but enough to last him the next week.

¶9. In its cross-examination of the defendant, the State noted that he is not a particularly responsible individual: age 26 and chronically unemployed, living off money given to him by his grandmother, being treated for depression and yet not telling his psychiatrist about his drug usage—and with a significant number of prior convictions on his record (none, however, involving drug trafficking). The Court will concur that this defendant is not a likely candidate for a Nobel Prize, or even for a Boy Scout Merit Badge. However, that is not the issue before us. What we must determine in this case is whether the

State of Ohio has proven, beyond a reasonable doubt, that the defendant was transporting or delivering the ten bags of marijuana with the intention that they be sold or resold by himself or someone else.

¶10. Taken in this context, the defendant's testimony presents a scenario that is no less reasonable and no less consistent with all the known facts in evidence than that proposed by the State of Ohio. Ten small baggies of marijuana, totaling barely twenty grams in weight, is not so large a quantity as to lead to the conclusion that the defendant was trafficking. The State has presented no evidence whatsoever of other relevant factors that would support such a finding: specifically, no attempt by the defendant to flag down cars, no hand-to-hand transactions, no radio reports of councilman's complaints or neighborhood alerts to increased drug trafficking activity along that stretch of Chester Avenue. No, the evidence here is simply that an otherwise uneventful traffic stop yielded an arrest for possession of ten small baggies of weed.

¶11. If, as previously proposed, the police rule of thumb gives rise to a rebuttable presumption that the drugs were intended to be sold or resold, the Court finds that the defendant has indeed rebutted such presumption under all the facts and circumstances in evidence in this case.

¶12. For the reasons set forth herein, the Court finds that the State of Ohio has failed to prove the defendant guilty of drug trafficking by evidence beyond a reasonable doubt. Having found at the conclusion of the State's case that the evidence as to the second count of this indictment (possession of criminal tools: money) was insufficient as a matter of law, the Court hereby finds the defendant Not Guilty of Drug Trafficking, as charged in Count 1. Upon the defendant's admission, and the undisputed evidence to support it, however, the Court must find the defendant guilty of the lesser and included offense of Drug Possession (Marijuana) in an amount of less than 100 grams, a minor misdemeanor.

IT IS SO ORDERED

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Judge Stuart A. Friedman

Dated: July 16, 2003