



1 of 1 DOCUMENT

STATE OF OHIO, Plaintiff-appellee -vs- ANDREA SMITH, Defendant-appellant

NO. 67524

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY

1995 Ohio App. LEXIS 2464

June 15, 1995, DATE OF ANNOUNCEMENT OF DECISION

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDING: Criminal appeal from Court of Common Pleas. Case No. 300656.

**DISPOSITION:** JUDGMENT: Affirmed.

**COUNSEL:** For Plaintiff-Appellee: STEPHANIE TUBBS JONES, ESQ., Cuyahoga County Prosecutor, BLAISE THOMAS, ESQ., Assistant County Prosecutor, Cleveland, Ohio.

For Defendant-Appellant: JAMES A. DRAPER, ESQ., Cuyahoga County Public Defender, DONALD GREEN, ESQ., Assistant Public Defender, Cleveland, Ohio.

**JUDGES:** ANN DYKE, PRESIDING JUDGE. NAHRA, J., AND O'DONNELL, J., CONCUR.

**OPINION BY:** ANN DYKE

## OPINION

### JOURNAL ENTRY AND OPINION

DYKE, J.:

Appellant was indicted on one count of drug trafficking under R.C. 2925.03, knowingly possessing marijuana in an amount more than three times the bulk amount. This indictment stemmed from an incident

which took place at appellant's home on July 28, 1993. The jury convicted appellant on the indicted charge on April 14, 1994. She received a sentence of twenty-four months which was suspended, and was placed on five years of probation. Appellant further owes \$ 500 as a fine plus 40 hours of community service.

In July of 1993, the Cleveland [\*2] Postal Service had been notified by officials in Houston regarding a package containing a large quantity of marijuana. The package was addressed to Michelle Smith with appellant's Cleveland address. The return address was a fictitious Houston address. On July 28, 1993 a controlled delivery of the brown paper wrapped package, weighing approximately nine pounds, was made to appellant's home by a postal inspector. Appellant came to the door and signed for the package. Several minutes later, pursuant to a previously obtained search warrant, police from the narcotics division entered appellant's home. They found the unopened package on the stairs at the back of the house. Police also found four or five marijuana cigarette butts and a package of rolling papers in a tin in the bedroom shared by appellant and her boyfriend. Several plastic baggies were found in the bedroom on the dresser. No scales or other drug paraphernalia were found.

Appellant told the officers that her middle name was Michelle, when asked who Michelle Smith was. Detective Bergeon asked appellant if she knew why anyone would want to ship her marijuana, to which she

answered "no." She indicated that she thought that the [\*3] package was from the Home Shopping Club. Several boxes from the Home Shopping Club were found in the house. Appellant also informed the officers that she placed the package on the back stairs because she was cooking fish and her hands were greasy. She did not want the package to get greasy or get a fishy smell to it. Detective Bergeon testified that appellant was cooking fish at the time.

Appellant took the stand to testify in her own defense. She stated that she did not take the time to look at the package before signing for it. Appellant also testified that she asked her boyfriend to take the package to the back stairs upon receiving it because he was going out with the dog and because the package was heavy. She further testified that she had ordered many things from the Home Shopping Club but at that time she was expecting several phones which she had ordered from General Electric, where she works. Appellant claimed that the marijuana butts and the baggies found in her bedroom belonged to her boyfriend.

Appellant filed a timely notice of appeal from her conviction and sentence, asserting two assignments of error.

ANDREA SMITH'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED [\*4] BY THE UNITED STATES AND OHIO CONSTITUTIONS, WAS DENIED WHEN SHE WAS CONVICTED OF AND SENTENCED FOR POSSESSION OF MARIJUANA ON EVIDENCE WHICH WAS INSUFFICIENT AS A MATTER OF LAW.

Appellant asserts that the State failed to produce sufficient evidence to prove that she had knowledge of the existence of the marijuana. She never opened the package and no evidence existed to show that she could have known what was in it. Appellant argues that she can not be convicted based upon her name written on the package and her mere presence in the house. Appellant's argument is not well-taken.

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.

*State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. [\*5] After reviewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found that appellant knowingly possessed marijuana in an amount greater than three times the bulk amount.

The parties stipulated to the fact that the box contained marijuana and that its weight exceeded the statutory bulk amount by more than three times. This left the jury to determine whether appellant was knowingly in possession. The evidence to support this element was that the box was sent to her home and addressed to her, in the name only those in her family used, Michelle. The explanation of why the box was taken immediately to the back of the house and set on the landing of the stairs leading to the back door was not convincing to the jury. The State proposed the theory that appellant was a middle person in the drug operation. Her job was to receive the drugs and send them to the actual dealers. This theory also explained why appellant did not have scales or other items indicative of the drug sales in her home. Appellant's testimony was contradictory in that she at one point stated that she thought the box was from the Home Shopping Club, then testified [\*6] that she had nothing on order from them, but was expecting a delivery of telephones from General Electric. Appellant also denied giving the officers any explanation at the scene as to why she had taken the box downstairs or why she had signed for it. Her statements regarding these two explanations were testified to by the detectives. A reasonable jury could have found appellant's testimony to be lacking in credibility.

Appellant's first assignment of error is overruled.

II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GIVING AN INSTRUCTION ON THE DEFINITION OF KNOWINGLY THAT WAS MISLEADING, ERRONEOUS, PREJUDICIAL AND THAT ADVERSELY AFFECTED THE SUBSTANTIAL RIGHTS OF THE APPELLANT TO THE EXTENT THAT THE RESULTING CONVICTION VIOLATED DUE PROCESS.

Appellant argues that the trial court used a definition of knowingly in its instruction to the jury which created a presumption of knowledge, thereby relieving the State of its burden to prove a required element of the trafficking offense beyond a reasonable doubt. Appellant asserts that the facts of this case do not support a reasonable finding of "deliberate ignorance" or "willful blindness" which might justify the definition [\*7] given to the jury by the judge. According to appellant's argument, the evidence of her guilt was not compelling enough to say that without the erroneous instruction a reasonable jury would have convicted her. Appellant's argument is not persuasive.

The facts presented to the jury supported a finding that appellant may have deliberately closed her eyes to the fact that the box contained an illegal substance. This factual support justified the added instruction to the jury as to the mens rea element of knowingly that, "You can further find the defendant acted knowingly if she deliberately closed her eyes to what she had reason to believe was the facts." (TR. 129).

We do not agree that such an instruction relieves the State of its burden to prove that appellant knowingly possessed the marijuana beyond a reasonable doubt. The instruction as stated does not create a presumption of knowledge. The State must present the facts and circumstances surrounding the delivery of the box to prove that one in appellant's shoes must have known that the box contained an illegal substance. We believe that the jury properly found that the State met this burden of proof in appellant's case. The trial [\*8] court did not err in instructing the jury on deliberate ignorance where the facts supported such an instruction.

Although the Federal case law is not binding upon this Court, we find it instructive in this area and agree with the lower court that *United States v. Rada-Solano* (1980), 625 F.2d 577 is factually analogous to the present case. The federal court held that the facts of *Rada-Solano* "presented a sufficient predicate to allow the jury to consider whether defendant either knew or had consciously avoided learning that the suitcases contained a controlled substance." *United States v. Rada-Solano, supra*, at 579.

Appellant's second assignment of error is overruled. Appellant's conviction and sentence are affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute [\*9] the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NAHRA, J., AND

O'DONNELL, J. CONCUR.

ANN DYKE

PRESIDING JUDGE

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.