

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-T-0121
EDDIE WATERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 669.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Eddie Waters appeals from a judgment of the Trumbull County Court of Common Pleas convicting him of two counts of possession of drugs following a jury trial. On appeal, he claims the trial court improperly excluded testimony he wished to present to show his adult daughter owned the drugs pursuant to a prescription. Because there is no evidence linking the drugs found on his person to any prescription, we conclude the trial court did not abuse its discretion in excluding the evidence.

{¶2} **Substantive Facts and Procedural History**

{¶3} On August 28, 2006, the police stopped Mr. Waters' vehicle after it was reported stolen by his girlfriend, who made the report because he took the car, registered in her name, over her objections. Patrolman Hipple spotted Mr. Waters' vehicle shortly after he left his residence. Mr. Waters did not stop his vehicle but instead drove the vehicle back to his residence while Patrolman Hipple pursued him for a mile. Mr. Waters apparently attempted to flee after he exited the vehicle. The officer wrestled him to the ground and arrested him for fleeing and eluding. While searching Mr. Waters incident to the arrest, Patrolman Hipple found what appeared to be narcotics in his pants pocket, which later tested to be Methadone, a schedule II drug, and Hydrocodone, a schedule III drug. Specifically, the officer found five Hydrocodone pills in a clear plastic bag, and one Methadone pill in a pill bottle, the label of which was peeled off.

{¶4} A grand jury indicted him on (1) failure to comply with order or signal of police officer in violation of R.C. 2921.331(B)&(C)(5)(a)(ii); (2) aggravated possession of drugs in violation of R.C. 2925.11(A)&(C)(1)(a), which related to his possession of Methadone; and (3) possession of drugs in violation of R.C. 2925.11(A)&(C)(2)(a), which related to his possession of Hydrocodone.

{¶5} Before trial, the state filed a motion in limine to exclude testimony which Mr. Waters sought to present to the jury to show the Methadone and Hydrocodone pills were not his but his daughter's, and he was merely bringing the drugs to her. The state argued the statute prohibits any knowing possession of a controlled substance, and therefore the fact that he did not own the drugs, even if proven, could not be an affirmative defense. The state argued any probative value of the testimony to show he

did not own the drugs would be substantially outweighed by the possibility of confusing or misleading the jury and therefore, pursuant to Evid.R. 403(A), such testimony should be excluded.

{¶6} Before trial, the court considered the state's motion in limine and granted it on the ground that the essential element of the offense is possession, not ownership. The court pointed out the name on the pill bottle was completely removed, noting that "the entire piece of paper in the area that would identify the person whose drugs these were was completely missing," and therefore there was no indication as to the name of the person to whom the drugs were prescribed.

{¶7} Mr. Waters, who had been previously convicted of and served time for aggravated robbery, possession of drugs, and trafficking in drugs, testified that his adult daughter had a throat surgery and recuperated at his house in Warren for two weeks. On August 28, 2006, he was bringing the drugs to his daughter in Canton. Because his girlfriend refused to drive him there, he took the car over her objections, even though his driver's license was suspended. Mr. Waters stated the pills found on him were Vicodin and "that's what my daughter is prescribed," despite the pretrial ruling that any testimony regarding a prescription was not permitted. The state objected to that statement, and the trial court admonished Mr. Waters for testifying about a prescription and instructed the jury to disregard it.

{¶8} The jury found him guilty of aggravated possession of drugs for his possession of Methadone, and possession of drugs for his possession of Hydrocodone, for which he was sentenced to 12 months and 60 days of incarceration, respectively. On appeal, he assigns the following error for our review:

{¶9} “The trail [sic] court committed reversible error and abused its discretion by holding that the appellant could not introduce evidence that he had been merely transporting or attempting to transport his daughter’s prescription drugs to her at the time of the events giving rise to the charges for aggravated drug possession and drug possession against appellant.”

{¶10} **Analysis**

{¶11} R.C. 2925.11 criminalizes obtaining, possessing, or using a controlled substance, providing for limited exceptions. It states, in pertinent part:

{¶12} “(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶13} “(B) This section does not apply to any of the following:

{¶14} “***.

{¶15} “(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.”

{¶16} “The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.” *State v. Kimble*, 11th Dist. No. 2005-T-0086, 2006-Ohio-6863, ¶8, quoting *State v. Sage* (1987), 31 Ohio St.3d 173, 31, paragraph two of the syllabus. “A trial court’s decision to exclude evidence will not be overturned absent an abuse of discretion. An abuse of discretion implies that the trial court’s decision was ‘arbitrary, unreasonable or unconscionable.’” *Id.* (internal citations omitted).

{¶17} By its plain language, R.C. 2925.11 criminalizes any knowing possession of a controlled substance. “Possession” is defined in R.C. 2925.01 as follows:

{¶18} “(K) ‘Possess’ or ‘possession’ means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.”

{¶19} Possession of drugs can be either actual or constructive. See *State v. McGhee*, 3rd Dist. No. 13-08-12, 2009-Ohio-4259, ¶19. A person has “actual possession” of an item if the item is “within his immediate physical possession.” *State v. Fugate* (Oct. 2, 1998), 4th Dist. No. 97 CA 2546, 1998 Ohio App. LEXIS 4846, *20. A person has “constructive possession” when that person “knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession.” *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus.

{¶20} Here, the Hydrocodone and Methadone pills were found on Mr. Waters’ person, and therefore he had *actual* possession, rendering “possession” a non-issue in this case. Mr. Waters attempted to establish an affirmative defense by way of testimony showing that another individual “owned” the drugs. We note in determining possession, ownership need not be established. “A person may indeed control or possess property belonging to another.” *State v. Mann* (1993), 93 Ohio App.3d 301, 308. Therefore, the only evidence relevant to whether Mr. Waters committed the offense prohibited by R.C. 2925.11 is evidence regarding his possession. Evidence of ownership which Mr. Waters sought to introduce, as the trial court correctly determined, is irrelevant for the purpose of R.C. 2925.11.

{¶21} R.C. 2925.11 exempts from criminal liability certain individuals who “knowingly obtain, possess, or use” a controlled substance, such as “[m]anufacturers,

licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies.” R.C. 2925.11(B)(1). Pertinent to this appeal is the prescription exception. The statute, for obvious reasons, provides an exception for “[a]ny person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs.” R.C. 2925.11(B)(4). Mr. Waters attempted to introduce testimony to show the drugs were owned by his daughter, who had obtained the drugs pursuant to a prescription following her surgery. However, the drugs found on Mr. Waters’ person were contained in a plastic bag and a pill bottle which had the label completely removed. Therefore, there is simply no evidence that could link these drugs to *any* prescription to warrant admission of testimony offered to show the drugs were lawfully prescribed and obtained. Given the state of the evidence, the prescription exception provided in R.C. 2925.11(B)(4) has no application. Therefore, the trial court did not abuse its discretion in granting the state’s motion in limine.

{¶22} Mr. Waters cites to *State v. Collier* (1991), 62 Ohio St.3d 267 for our consideration. In this 1991 case, the Supreme Court of Ohio reviewed the constitutionality of R.C. 2925.11 under its prior version. The version in effect at the time stated R.C. 2925.11(A) does not apply to “any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, *where the drug is in the original container in which it was dispensed to such person.*” (Emphasis added.) *Id.* at 269. The majority of the court upheld the constitutionality of R.C. 2925.11.

{¶23} The dissent in *Collier*, however, found the statute unconstitutionally vague, believing it failed to provide a standard “by which the ordinary person or law

enforcement officials can determine when a person taking a controlled substance is engaging in conduct the legislature intended to criminalize.” *Id.* at 273.

{¶24} The dissent pointed out the following fact patterns where a person would be subjected to prosecution under the statute: when a person emptied prescription drugs from the bottle into his hand before swallowing them; took pills from the bottle and carried them to the kitchen or bathroom; or carried medication in a pillbox, pocket, or coin purse throughout the day, the week, or on a trip. *Id.* The majority in *Collier*, however, was not troubled by these scenarios and found the statute constitutional.

{¶25} R.C. 2925.11 has since been amended by the legislature. The current version of the statute exempts “[a]ny person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe the drugs.” The clause that troubled the *Collier* dissent -- “where the drug is in the original container in which it was dispensed to such person” -- had been removed in March of 2000. Under the current statute, an individual can legally possess such substance which is not in the original container as long as it has been obtained pursuant to a lawful prescription. Therefore, the “vagueness” found by the *Collier* dissent arguably no longer exists.

{¶26} In any event, we are not called upon in this appeal to review whether current R.C. 2925.11 is unconstitutionally vague. The sole question presented by Mr. Waters for our review is whether the trial court abused its discretion in excluding testimony purportedly showing another individual obtained the drugs found on the defendant’s person pursuant to a prescription. Because the containers found on Mr.

Waters' person had no prescription labels that could potentially link the drugs to a lawful prescription, we have answered the question in the negative.

{¶27} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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{¶28} I respectfully dissent.

{¶29} The majority contends that the trial court did not abuse its discretion by excluding testimony purportedly showing another individual obtained the drugs found on Mr. Waters' person pursuant to a prescription. I disagree.

{¶30} R.C. 2925.11 provides in part:

{¶31} "(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶32} "(B) This section does not apply to any of the following:

{¶33} "****

{¶34} "(4) Any person who obtained the controlled substance pursuant to a lawful prescription issued by a licensed health professional authorized to prescribe drugs."

{¶35} In the instant matter, the Hydrocodone and Methadone pills were found on Mr. Waters' person. He attempted to establish an affirmative defense by way of testimony showing that the pills were his daughter's, who had obtained them pursuant to a prescription following a surgery, and that he was taking them to her. However, he was not permitted to do so by the trial court.

{¶36} "Police officers, prosecutors, and courts determine that the [Eddie Waters] of our society are in violation of R.C. 2925.11, while excusing junior executives who embark on business junkets, carrying a pill case which contains sleeping pills, muscle relaxants, and tranquilizers, along with their Maalox and Nuprins." *State v. Collier* (1991), 62 Ohio St.3d 267, 274 (Brown, J., dissenting). The "Eddie Waters" of our society are more likely determined by police officers, prosecutors, and courts to violate the statute, whereas society's local teacher, businessman, or doctor transporting prescription drugs to his or her child is more likely to be excused. "Enforcement depends upon *who* the defendant is and *where* the defendant is found, rather than on the *conduct* of the defendant." *Id.* (Emphasis sic.)

{¶37} Selective application and enforcement of statutes is a dangerous and slippery slope upon which to embark. The act of bringing someone lawfully prescribed medication occurs each and every day. The trial court correctly interpreted a violation of the statute equates to a crime wherein the mens rea is that of strict liability and that the defendant's relationship or reason for possessing these prescribed medications is not an element of the offense. The trial court as well as society acknowledge that the defense of lawfully prescribed medication being transported by a person other than the person's whose name is on the bottle occurs many times a day. Furthermore, there is

no legal prohibition to the medication at the pharmacy being given to someone other than those to whom it is lawfully prescribed. It logically flows that the majority's analysis ignores this fundamental reality. The defendant's right to a fair trial includes being able to offer a defense to the crime charged in this instance.

{¶38} For the foregoing reasons, I dissent.