

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
HANCOCK COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 5-04-12

v.

MAURICE R. ROBINSON

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: October 4, 2004

ATTORNEYS:

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CUPP, J.

{¶1} Defendant-appellant, Maurice Robinson (hereinafter “Robinson”), appeals the judgment of the Common Pleas Court of Hancock County, finding him guilty of Trafficking in Cocaine, in violation of R.C. 2925.03(A), and sentencing him to a term of incarceration of eleven months, restitution in the amount of \$100, and payment of court costs.

{¶2} On June 26, 2002, the Hancock County METRICH Drug Task Force set up a controlled sale of crack cocaine. Angela Lowe (hereinafter “Lowe”), an informant, was participating in the sale and had been provided \$100 with which to purchase crack cocaine. That day, Lowe drove to the parking lot of the Dairy Mart, a convenience store in Findlay, Ohio, and parked her car. Lowe exited her vehicle and approached the passenger side of a white Mercury Topaz in the parking lot. Lowe gave the passenger of the car \$100 in exchange for crack cocaine. Based on the video and audio surveillance the task force had implemented in the parking lot, as well as the statements of Lowe, Robinson was identified as the passenger of the car and was subsequently arrested.

{¶3} Robinson was indicted on one count of Trafficking in Cocaine, in violation of R.C. 2925.03(A), a felony of the fifth degree. The case proceeded to a jury trial on January 5, 2004. The jury returned a verdict of guilty.

{¶4} On February 26, 2004, Robinson was sentenced to a term of incarceration of eleven months, restitution in the amount of \$100 and was ordered to pay his court costs.

{¶5} It is from this sentence that Robinson appeals and sets forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

In a harmfully prejudicial abuse of its discretion, the trial court reversibly erred when it sustained the state's objections to the Defendant-appellant's inquiries about the state informant's drug usage and drug trafficking, thereby violating Rules 402, 607, 608 and 609 of the Ohio Rules of Evidence, as to respective relevancy, impeachment and truthfulness; and also denying the Defendant-appellant's fundamental, substantial rights to confrontation of witnesses, to a fair jury trial, and to due process of law, guaranteed under the respective Sixth and Fourteenth Amendments to the Constitution of the United States, and under Section 10, Article I of the Constitution of the State of Ohio.

{¶6} Robinson asserts that during his cross-examination of Angela Lowe the trial court abused its discretion in sustaining objections raised by the state to defense counsel's questions regarding Lowe's personal drug use and history of drug trafficking. Robinson contends that this line of questioning was proper as Lowe's credibility was highly relevant to his defense.

{¶7} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Jacks* (1989), 63 Ohio App.3d 200, 207. Accordingly, we review to determine if the trial court abused its discretion. *State*

v. Davis (1988), 49 Ohio App.3d 109, 114. The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} Evid.R. 608(B) concerns evidence of character and conduct of a witness and states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of a crime as provided in Evid.R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness * * *.

Evid.R. 608(B) vests a trial court with discretion to allow cross-examination about specific instances of conduct of a witness “if clearly probative of truthfulness or untruthfulness.” *State v. Brooks* (1996), 75 Ohio St.3d 148, 151. Thus, there must be a high degree of probative value as to truthfulness or untruthfulness of the witness before the trial court will allow cross-examination into specific instances of the witness’s prior conduct. Staff Notes to Evid.R. 608; *State v. Williams* (1981), 1 Ohio App.3d 156, 157.

{¶9} As Robinson argues, the cross-examination of a witness regarding drug use, to the extent that it tended to affect the credibility of the witness to

observe matters about which he testifies, is relevant on the issue of credibility. *Johnson v. Knipp* (1973), 36 Ohio App.2d 218, 223. However, cross-examination of a witness as to *general* drug usage to show that he was a person unworthy of belief merely because he was of such character may not be clearly probative of truthfulness in a particular case. *State v. Boggs* (Jan. 24, 1991), Adams App. No. CA 494; *State v. Rutledge* (Apr. 12, 1983), Montgomery App. No. 7830.

{¶10} In the case sub judice, the prosecutor asked Lowe, on direct examination, about her prior drug use, how long she had used drugs, and what drugs she had used. Lowe testified that she had previously used money received for her services as an informant to buy drugs and that she was using crack in June 2002, when she was working as an informant. However, she further testified that at the time of the controlled buy involving Robinson she was not using drugs. Lowe explained that she was never high prior to conducting a controlled buy because she needed money from the buy to purchase crack. Further, Lowe's prior convictions for drug trafficking and burglary were introduced into evidence.

{¶11} On cross examination, defense counsel inquired into Lowe's past convictions and her past drug use. Lowe stated that she had been taking drugs in 2002 and that she had since been in counseling for her drug addiction. She further stated that she had been charged with a violation of community control sanctions previously imposed upon her.

{¶12} Among the prosecution's objections sustained by the trial court during cross-examination of Lowe were objections to questions regarding Lowe's use of crack cocaine in July 2002, the month after the controlled buy; whether Lowe ever sold drugs out of her home; whether Lowe sold drugs out of her home after June 2002; and what drugs Lowe used that resulted in a violation of her community control sanctions. The trial court sustained these objections on the basis that they were not relevant to the issue of Lowe's credibility.

{¶13} After reviewing the record, we find that the trial court allowed counsel significant latitude in the cross-examination of informant Lowe. Lowe testified to her history of drug use in detail, but maintained that she was not using drugs at the time of the controlled sale. From her testimony, the jury was afforded an ample basis by which to judge Lowe's credibility. Therefore, we do not find that the trial court abused its discretion in sustaining the prosecutor's objections in a few limited instances when Lowe was questioned regarding her general drug use, as it was not clearly probative of truthfulness or untruthfulness. Nor do we find this action of the trial court violated appellant's constitutional rights.

{¶14} Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

As being contrary to law, the trial court violated Ohio Revised Code financial sanctions and restitution guidelines, specifically under O.R.C. 2953.08(A)(4) and O.R.C. 2929.18, and also

violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, when said trial court imposed the sentencing sanctions of restitution and court costs upon the Defendant-appellant, whom the trial court had determined as being indigent.

{¶15} As part of his sentence, the appellant herein was ordered to pay restitution in the amount of \$100 to the METRICH Task Force and to pay his court costs. Appellant asserts that the imposition of these financial sanctions was contrary to law, as the trial court had previously determined he was indigent. Appellant maintains that the trial court was without authority to impose such sanctions until a hearing had been held to determine appellant's ability to pay.

{¶16} When sentencing an offender, R.C. 2947.23 mandates that “[i]n all criminal cases * * * the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs.” The trial court is not required to hold a hearing or otherwise determine an offender's ability to pay before ordering him to pay such costs. *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069, ¶32; *State v. Scott*, 6th Dist. No. L-01-1337, 2003-Ohio-1868, ¶7. Appellant's argument regarding the imposition of court costs is, therefore, rejected.

{¶17} Similarly, R.C. 2929.18(A)(1) permits the trial court to sentence an offender to pay restitution. The statute states, “[a]t sentencing, the court shall determine the amount of restitution to be made by the offender.” *Id.* Pursuant to

R.C. 2929.18(E), if necessary, the trial court *may* hold a hearing for the purpose of determining whether the offender is able to pay the sanction or is likely in the future to be able to pay. Emphasis added. However, a hearing is not strictly required by R.C. 2929.18(E), so long as the record contains evidence that the trial court considered the offender's present and future ability to pay before imposing the sanction of restitution. *State v. Scott*, 6th Dist. No. L-01-1337, 2003- Ohio-1868, at ¶9.

{¶18} In the case sub judice, the record reveals that appellant has no assets, but has been employed at a wood shop in Findlay for approximately one month and has been employed at a factory in Sidney, Ohio for approximately a year and a half. At sentencing, the trial court indicated that it was aware of appellant's limited employment history, as well as his indigent status.

{¶19} We find that this evidence is sufficient to conclude that the trial court considered the appellant's ability to pay before imposing restitution in the amount of \$100. Moreover, we do not find that the trial court abused its discretion in ordering restitution, noting that the \$100 ordered to be paid represents the amount of money that was illegally gained by appellant from the controlled sale of crack cocaine.

{¶20} Accordingly, appellant's second assignment of error is overruled.

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{¶21} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

SHAW, P.J., and BRYANT, J., concur.

/jlr