

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080953
Plaintiff-Appellee,	:	TRIAL NO. B-0710132
vs.	:	<i>JUDGMENT ENTRY.</i>
DWAYNE CROSS,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Dwayne Cross appeals his conviction following a bench trial for one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2). The trial court sentenced him to three years of community control. On appeal, Cross raises one assignment of error in which he argues that his conviction was against the manifest weight of the evidence.

At trial, Cincinnati police officer Eric Gilbert testified that he was on uniformed patrol in a marked cruiser around 10:30 p.m. on December 7, 2007, when he saw Cross and another young man lingering in front of a pizza parlor that had been the subject of a number of recent robberies. When he drove by the area, the two men hurried across the street, crossing against the light. Officer Gilbert stopped to issue Cross and the other man a citation for jaywalking. He saw that Cross was acting nervously. He was looking side to side, and his right arm was entirely hidden

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

by his sleeve and plunged into his pants. When Officer Gilbert asked to see Cross's hand, Cross "hesitated and positioned himself behind a mailbox." Officer Gilbert testified that he asked Cross two more times to remove his hand from his sleeve. On the third request, Cross removed his hand.

Officer Gilbert then asked Cross for identification. He also asked Cross if he had any contraband. Cross told Officer Gilbert that he had a .22-caliber gun. As a result, Officer Gilbert handcuffed Cross and searched him. He found a gun inside Cross's sweatshirt pocket where Cross's right arm had initially been concealed. Officer Gilbert removed the gun, which he believed to be a plastic BB gun, and placed it in his vehicle. He then read Cross his *Miranda* rights and placed him in the back seat of his cruiser. After writing Cross a citation for jaywalking, Officer Gilbert released him and turned his cruiser around.

When the officer began looking at the gun further, he saw some round .22-caliber cartridges inside the butt of the gun. He immediately pulled his cruiser over and placed Cross, who had walked across the street towards the pizza parlor, back into custody. Cross told Officer Gilbert that he had found the gun in an alley. But Officer Gilbert testified that it had been raining that day, and that the gun was not wet. Officer Gilbert further testified that the gun had been test-fired and that it was operable.

When Cross testified, he provided the trial court with a different version of the events. Cross stated that he had been walking to a bus stop with his brother when he found what he thought was a BB gun in the alley. He put the gun in the front pocket of his hooded sweatshirt. He was subsequently stopped by Officer Gilbert, who asked him for identification. Cross gave the officer his driver's license. After Officer Gilbert had checked his identification, he told Cross he had stopped him

for jaywalking. He then asked Cross why he was fidgeting. Cross told the officer that he was not fidgeting. Cross testified that he was just cold and had placed both his hands inside his sleeves to keep them warm. According to Cross, Officer Gilbert then pulled him over and asked him if he had anything harmful. But before he could answer, Officer Gilbert had pulled the gun out of his sweatshirt and asked him if it was a pellet gun. Cross replied that it was. He testified that he was not familiar with guns, that he had no gun training, that he had no criminal history, and that he was unaware that the gun contained any bullets. During cross-examination, he admitted telling the officer that he had found the gun in an alley, but he denied hiding behind the mailbox. He also denied telling the officer that he was carrying a .22-caliber gun.

Cross contends that the trial court lost its way in finding him guilty of carrying a concealed weapon. He argues that the weight of the evidence did not support a finding that he knew the gun was a firearm, but only supported the finding that he believed the gun to be a pellet gun. We disagree.

The trial court had evidence before it that Cross was jaywalking late at night in front of a pizza parlor that had been the target of several recent robberies. When confronted by Officer Gilbert, he began acting nervously, including positioning himself behind a mailbox and putting his right arm up his sleeve. When questioned by the officer, he told the officer that he had a .22-caliber gun. Furthermore, as the trial court noted, the gun found on Cross had the words “Intratech Sports .22” imprinted on it. While Cross testified that he had found the gun and believed it to be a pellet gun, the trial court was free to reject this testimony.² Given our review of the record, we cannot conclude that the trial court lost its way and created a manifest

² *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 2129, paragraph one of the syllabus.

OHIO FIRST DISTRICT COURT OF APPEALS

miscarriage of justice in finding Cross guilty.³ We, therefore, overrule Cross's sole assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on October 14, 2009

per order of the Court _____
Presiding Judge

³ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.