

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

STATE OF OHIO,	:	APPEAL NO. C-090088
Plaintiff-Appellee,	:	TRIAL NO. B-0805913
vs.	:	<i>JUDGMENT ENTRY.</i>
ANTHONY WHITEHEAD,	:	
Defendant-Appellant.	:	

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

Anthony Whitehead appeals his conviction for trafficking in cocaine. We conclude that his two assignments of error do not have merit, so we affirm the judgment of the trial court.

Whitehead was indicted on one count of trafficking in cocaine. The case was tried before the court. Cincinnati police officer Sandy Hanes testified that on July 23, 2008, she was working undercover posing as a prostitute. According to Hanes, Whitehead waved her over to his car and asked her if she wanted crack cocaine. When Hanes asked what she would have to do for the cocaine, Whitehead stated that she would have to have sex with him. Hanes told Whitehead that she needed to tell “her man,” that he should drive down the block, and that she would meet him there. When Whitehead pulled down the street, he was arrested by officers waiting there. Officer Kenneth Vanderpool, who arrested Whitehead, testified that no drugs were found on Whitehead or in his car. Whitehead testified that he had only rolled down

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

his window because he had been approached by Hanes. He also stated that he had not offered crack to Hanes.

At the conclusion of the trial, the court found Whitehead guilty. Following a hearing, Whitehead was sentenced to three years of community control. This appeal followed.

We consider Whitehead's second assignment of error first. In it, he claims that his conviction was based on insufficient evidence and was against the manifest weight of the evidence. When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense.² On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.³

Whitehead was convicted under R.C. 2925.03(A)(1), which makes it a crime to knowingly "sell or offer to sell a controlled substance." To support its allegation that Whitehead had offered to sell a controlled substance, the state needed only to show that Whitehead had made the offer, not that he actually had the substance to sell.⁴ We conclude that the state presented sufficient evidence to support Whitehead's conviction. And having reviewed the record, we conclude that the trial court did not lose its way when it found Whitehead guilty of trafficking. The court was in the best position to determine the credibility of the witnesses. The second assignment of error is overruled.

Whitehead's first assignment of error is that he was denied the effective assistance of counsel, because defense counsel failed to move for an acquittal under Crim.R. 29 at the close of the state's case. A Crim.R. 29 motion challenges the sufficiency of the evidence presented by the state. We have already concluded that

² See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

³ See *id.* at 387.

⁴ See *State v. Sieng*, 10 Dist. No. 04AP-556, 2005-Ohio-1003, reversed in part, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.

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the state presented sufficient evidence of the offense. Because a Crim.R. 29 motion would not have been successful, Whitehead was not prejudiced by his counsel's failure to seek a judgment of acquittal at the close of the state's case. The second assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

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 7, 2009
per order of the Court _____.

Presiding Judge