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State v. Foreman
2021-Ohio-3409

I. INTRODUCTION

Proof of criminal venue is a constitutional right of the accused individual and in the state of Ohio, the Supreme Court has established that it is the burden of the State to prove criminal venue beyond a reasonable doubt, even though it is not a perspicuous element of any given criminal charge.[1] Criminal venue can be established by the State in one of two enumerated ways, either by explicit proof, or substantial support from corroborating circumstantial evidence.[2] In cases involving criminal charges of drug possession, venue often presents a vexing and complex issue, especially when the drug is not discovered until after ingestion via drug metabolite tests analyzing the blood, urine, or hair of the accused individual.[3] Where and when did the accused possess the drug, and how can the State possibly hope to prove such possession days or weeks after-the-fact? The issue is apparent, a failure to find venue based solely on the presence of metabolites means many drug "possessors" will walk free, absent further corroborating evidence. However, courts presented with these issues need to tread cautiously. Holding that the State has proven venue beyond a reasonable doubt in instances where the only evidence of possession is a positive drug test, has potential to manufacture a severe injustice in which a defendant could be charged in any number of courts based on where they test positive for a particular drug, rather than where they actually possessed the drug.[4] This holding would also be inconsistent with plain and ordinary meaning the word "possession," conflating it with, and punishing people for, drug use.

The Ohio Supreme Court considered this exact vexing and complicated issue in *State v. Foreman*.[5] *Foreman* includes a fascinating delve into criminal venue and the definition of possession as included in relevant Ohio

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1. OHIO CONST. art. I, § 10; *See* State ex rel. Toledo Blade Co. v. Henry County Court, 926 N.E.2d 634, 644 (Ohio 2010); State v. Were, 890 N.E.2d 263, 289 (Ohio 2008) (citing State v. Headley, 453 N.E.2d 716, 718 (Ohio 1983) ("The standard of proof [for venue] is beyond a reasonable doubt[.]")).

2. *Were*, 890 N.E.2d at 289 (citing *Headley*, 453 N.E.2d at 718 ("[V]enue need not be proved in express terms so long as it is established by all the facts and circumstances in the case.")).

3. *See generally* State v. Foreman, Slip Opinion No. 2020-0866, 2021-Ohio-3409 (2021); *but see* State v. Whistler, 851 N.W.2d 905, 910 (S.D. 2014).

4. *See infra,* Part IV. C.

5. *See generally Foreman*, 2021-Ohio-3409.

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criminal statutes.[6] *Foreman* also provides an intensive analysis in the mechanisms utilized by the State to prove criminal venue, as well as what does/does not constitute sufficient corroborating evidence to do so.[7] Ultimately, the Court concluded that the presence of cocaine metabolites in the urine, umbilical tissue, and stool of a newborn child was not sufficient to prove cocaine possession in regards to the mother of the child.[8] Therefore, the Court held, venue in the county where the metabolites were detected, without further corroborating evidence tending to support such a finding, was inappropriate.[9]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Kelly A. Foreman was convicted of cocaine possession in violation of R.C. 2925.11(A) and R.C. 2925.11(C)(4)(a) after a bench trial in the Seneca County Court of Common Pleas, a fifth-degree felony in the state of Ohio.[10] This conviction was the result of a drug test administered to Foreman's newborn son shortly after his birth in a hospital in Seneca County, Ohio for which he showed symptoms of cocaine withdrawal and tested positive for cocaine metabolites in his umbilical tissue, urine, and meconium.[11] The result of this test eventuated in Foreman being interviewed by the Seneca County Department of Job and Family Services.[12] In that interview, Foreman admitted to using cocaine while pregnant with her son between six (6) and twelve (12) times, with the most recent occurrence about two weeks before his birth.[13] However, Foreman stated that she hid her cocaine use from her fiancé, and did not use cocaine at her residence in Seneca County.[14]

At trial in Seneca County, Foreman did not dispute her history of drug use, but rather argued that the State failed to prove venue in Seneca County beyond a reasonable doubt and thereafter moved for acquittal pursuant to Crim.R. 29.[15] Foreman sought to show that assimilation of a foreign substance into a person's body (like the metabolization of drugs) does not qualify as possession, and therefore the State provided insufficient evidence that she possessed cocaine in Seneca County.[16] However, the trial court

6. *Id.*
7. *Id.*
8. *Id.* at ¶ 19.
9. *Id.* at ¶ 31.
10. *Foreman*, 2021-Ohio-3409 at ¶ 2.
11. *Id.*
12. *Id.* at ¶ 4.
13. *Id.*
14. *Id.*
15. *Foreman*, 2021-Ohio-3409 at ¶ 5.
16. *Id.*

ultimately found the State's counterargument more persuasive, denying Foreman's Crim.R. 29 motion and sentencing her to three years of community control.[17]

Foreman appealed to the Ohio Third District Court of Appeals, again contesting that the State failed to establish venue beyond a reasonable doubt.[18] In a 2-1 decision, the Third District affirmed the decision of the trial court, explaining that the evidence of metabolites in her son's umbilical cord, meconium, and urine qualified as sufficient possession to establish venue in Seneca County.[19] The Ohio Supreme Court thereafter accepted Foreman's discretionary appeal to determine whether the presence of a drug in an defendant's body is sufficient to establish venue in the charging county.[20]

III. THE COURT'S DECISION AND RATIONALE

A. Unanimous Opinion by Chief Justice O'Connor

In Section II of the Court's opinion, the Court explained that the sole question in dispute was whether cocaine metabolites qualify as possession under the definition within R.C. 2925.11(A).[21] The State asserted that not only had it sufficiently established venue in Seneca County based on the positive cocaine test, it also contested that the facts and circumstances (including the positive test, Foreman's residence in Seneca County, and admission of using cocaine while pregnant), viewed together, proved venue in Seneca County.[22]

Beginning in Section II(A) of the Court's opinion, it explained that: "Article I, Section 10 of the Ohio Constitution affords the accused the right to 'a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.' "[23] That same provision, the Court opined, fixes venue, while R.C. 2901.12 provides the statutory authority for venue in Ohio.[24] R.C. 2901.12(A) states that, "[t]he trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and . . . in the territory of which the offense or any element of the offense was committed."[25] The Court further opined that, "[a]lthough venue is not a material element of any criminal offense, it must be proved at

17. *Id.* at ¶ 6.
18. *Id.* at ¶ 7.
19. *Id.*
20. *Foreman*, 2021-Ohio-3409 at ¶ 8.
21. *Id.* at ¶ 9
22. *Id.* at ¶ 10.
23. *Id.* at ¶ 12 (quoting OHIO CONST. art. I, § 10).
24. *Id.*; *See generally* OHIO REV. CODE ANN. § 2901.12 (2015).
25. *Foreman*, 2021-Ohio-3409 at ¶ 12 (quoting OHIO REV. CODE ANN. § 2901.12(A) (2015)).

trial beyond a reasonable doubt, unless it has been waived by the defendant."[26] The Court explained that venue can be proved either in express terms or by a conglomeration all the facts and circumstances in a particular case.[27] In this particular case, the Court explained that Foreman was charged with possession of cocaine in violation of R.C. 2925.11(A), which expressly states: "No person shall knowingly obtain, possess, or use a controlled substance."[28] R.C. 2925.01(K) provides the relevant definition of "possess," defined as "having control over a thing or substance."[29]

In Section II(B) of its opinion, the Court wrote that they had never addressed the element of possession in the context of metabolites in the umbilical cord, urine, and meconium of a newborn child.[30] However, the Court looked to other courts that had considered the same/similar issues, and concluded that the "great majority" of those decisions found that the mere presence of a controlled substance in a person's blood or urine did not establish possession.[31] The thrust of those holdings, the Court explained, "is that when a controlled substance is assimilated in a person's body, the person loses the ability to control or possess the substance."[32] The Court contrasted ingestion of a drug with insertion of a drug within a container into the body, the latter allowing the person to expel the drug and use it after such expulsion.[33] That situation is different, the Court explained, from ingestion, which allows the drug to assimilate into the consumer's body.[34] Because Foreman did not have "control" over the drug within the definition of R.C. 2925.01(K) in Seneca County, as it was assimilated into her body via ingestion, venue was not properly established according to the Court.[35]

The Court further explained that at the time of her son's birth, Foreman could not "exercise restraint, direct influence, or exert power" over the ingested cocaine, which is relevant to possession by conventional definition of the word.[36] The Court also found the State's position to the contrary troubling, which would, in its eyes, allow a person to be charged with possession in every county in which they test positive for a particular

26. *Id.* at ¶ 13 (citing State v. Draggo, 418 N.E.2d 1343, 1345 (1981)).
27. *Id.*
28. *Id.* at ¶ 14 (quoting 2925.11(A)); *see also* OHIO REV. CODE ANN. § 2925.11(C)(4) (2019) (establishing that possession of cocaine is a felony in the state of Ohio).
29. *Id.* (quoting OHIO REV. CODE ANN. § 2925.01(K) (2021)).
30. *Foreman*, 2021-Ohio-3409 at ¶ 16.
31. *Id.*
32. *Id.* at ¶ 17.
33. *Id.* at ¶ 18.
34. *Id.*
35. *Foreman*, 2021-Ohio-3409 at ¶ 20.
36. *Id.*

drug.[37] The Court utilized several hypothetical examples to aptly illustrate this concern.[38]

In Section II(C) of its opinion, the Court held that the circumstantial evidence presented by the State was also insufficient to establish venue in Seneca County.[39] The Court opined that while circumstantial evidence, if pervasive, can establish venue, such corroborating evidence in the present case did not tend to prove that Foreman possessed cocaine in Seneca County.[40] This evidence, including the fact that Foreman lived in Seneca County while pregnant actually proved the contrary, in that Foreman never used cocaine in front of her other children, her fiancé did not know of the drug use, and that she did not use it at her home.[41] Further, Foreman never told her caseworker where she ingested the cocaine, nor did the State show that she had been in Seneca County during the two-week period in which she admitted to using cocaine prior to the birth of her son.[42] The Court also distinguished cases relied on by the amicus curiae Ohio Prosecuting Attorneys Association, stating that those cases showed much more corroborating evidence than the case at bar to establish proper venue, like eyewitness accounts of drug purchase or paraphernalia discovered at the Foreman residence.[43]

IV. ANALYSIS

A. The Court's Decision is Consistent with the Definition of the Word "Possession"

The unanimity of the Ohio Supreme Court is telling.[44] The outcome in this case is the only one that makes logical and practical sense. To hold the opposite, that a positive drug test of a newborn child is sufficient to prove possession in the county where the test is administered would do violence to the very definition of the word possession.[45] Fortunately, the Court did not need to go any further than the statute itself to find the definition which, as mentioned earlier, defines possession as, "having control over a thing or substance."[46] However, even if the Court found it necessary to confer with

37. *Id.* at ¶ 21.
38. *Id.*at ¶¶ 22-24.
39. *Id.* at ¶ 25.
40. *Foreman*, 2021-Ohio-3409 at ¶ 27.
41. *Id.*
42. *Id.* at ¶ 29.
43. *Id.* at ¶ 30.
44. *Id.* at syllabus.
45. *Possession*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2020); *Possession*, CAMBRIDGE LEARNER'S DICTIONARY (4th ed. 2013).
46. OHIO REV. CODE ANN. § 2925.01(K) (2021).

extra-textual sources, its conclusion would have been the same.[47] As Judge Willamowski opined in his dissent in the lower court's opinion, "[i]f a person ingests a regulated substance in a manner that assimilates it into the body, then '[t]he ability to control the drug is beyond human capabilities.' "[48] Judge Willamowski's and the Ohio Supreme Court's analysis is consistent with the ordinary meanings of the words "possess" and "control."[49] The natural import of these words implies an ability to influence the object in question (in this case, cocaine), and once such an object has been ingested and assimilated into the body the ability to exert influence over the object vanishes.[50] The inquiry must necessarily end there. If no control can be proven by the State in a particular county, and, as was true in this case, there is a severe lack of other corroborating circumstances to prove criminal venue, then there is not even a sliver of hope that the State can show possession of a drug in a certain jurisdiction.[51]

B. The Court's Holding is Consistent with a Pervasive Body of Case Law Throughout the Country

The credibility of the Court's holding is further bolstered by numerous decisions with similar holdings on the issue of possession throughout the country. The Court mentions one itself, *State v. Flinchpaugh*, decided by the Kansas Supreme Court, in which the Court stated that:

> "[o]nce a controlled substance is within a person's system, the power of the person to control, possess, use, [or] dispose of [it] is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance."[52]

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47. *Possession*, BLACK'S LAW DICTIONARY (11th ed. 2019).

48. State v. Foreman, 155 N.E.3d 168, 177 (Ohio Ct. App. 2020) (Willamowski, J., dissenting) (quoting Logan v. Cox, 624 N.E.2d 751, 754 (Ohio Ct. App. 4th Dist. 1993)).

49. *Foreman*, 155 N.E.3d at 177-178.

50. *Id.*

51. State v. Dickerson, 82 N.E. 969, paragraph 1 of the syllabus (Ohio 1907) ("In the prosecution of a criminal case, it is not essential that the venue of the crime be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment.").

52. *Foreman*, 2021-Ohio-3409 at ¶ 17 (quoting State v. Flinchpaugh, 659 P.2d 208, 211 (Kan. 1983)).

However, the Kansas Supreme Court does not stand alone in favor of this position.[53] Far from it. Several of the highest state courts in the United States have held nearly identically to the Ohio Supreme Court in *Foreman*, when interpreting statutes that similarly define the word "possess."[54] This only further supports the Ohio Supreme Court's conclusion that "possess" and "control" necessarily imply the ability to influence or exert dominion over the drug or substance in controversy.[55] Thus, the holding in this case not only is the unequivocally correct one, it is also supremely uncontroversial given the backdrop of cases that have supported the exact same line of reasoning for upwards of five decades.[56]

C. Practical Consequences of Foreman, Impact on Criminal Venue Decisions in the State of Ohio

Unfortunately for Ohio prosecutors, the Ohio Supreme Court has reaffirmed the importance of proving venue beyond a reasonable doubt in criminal cases.[57] Undoubtedly, if the Court were to hold that a positive drug test is categorically sufficient to establish criminal venue in the county the drug user tested positive in, the job of prosecutors would be easier, gifting them a leisurely avenue that they could exploit. The practical consequence of this holding, however, is that many drug users will walk free. It will be impossible, without a number of corroborating circumstances that likely will not become apparent from interviews with Department of Job and Family Service workers (as the State mentioned in their oral argument, such

53. *See* State v. Ireland, 133 P.3d 396, 402 (Utah 2006) ("Although we conclude that the existence of a controlled substance in the bloodstream is not itself a violation of the possession or use subsection, the State may nevertheless present evidence of a controlled substance in the bloodstream, along with other evidence, to establish that the district court has jurisdiction over such a charge."); State v. Harris, 646 S.E.2d 526, 530 (N.C. 2007) ("Therefore, we conclude that a positive urinalysis indicating the presence of marijuana metabolites alone is not substantial evidence sufficient to prove that defendant knowingly and intentionally possessed marijuana.").

54. John Thomas Richter, *South Dakota Performs Legal Alchemy and Transmutes 'Use' into 'Possession'*, 50 S.D. L. REV. 404, 408-409 (2005) ("The majority rule holds that use of a controlled substance and possession of a controlled substance are distinct and separate crimes.").

55. *See* Green v. State, 398 S.E.2d 360, 362 (Ga. 1990) ("The presence of cocaine metabolites in body fluid is direct evidence only of the fact that cocaine was introduced into the body producing the fluid, and is not direct evidence that the person possessed the cocaine.").

56. Richter, *supra* note 54 at 408-409; *See* Dawkins v. State, 547 A.2d 1041, 1046 (Md. Ct. App. 1987) ("an individual ordinarily would not be deemed to exercise 'dominion or control' over an object about which he is unaware"); Commonwealth v. Pellegrini, 608 N.E.2d 717, 720 n.7 (Mass. 1993) ("absent other evidence, the mere presence of a controlled substance in a person's own body will not constitute possession within the meaning of criminal statutes"); State v. Yanez, 553 P.2d 252, 252 (N.M. Ct. App. 1976) (holding presence of morphine in urine alone to be insufficient to establish possession); State v. Hornaday, 713 P.2d 71, 75 (Wash. 1986) ("Once [alcohol] is within a person's system, the power of a person to control, possess, use or dispose of it is at an end. The drug is assimilated by the body. The essential element of control is absent.").

57. *Foreman*, 2021-Ohio-3409 at ¶ 31.

workers often do not ask the right questions necessary to pursue criminal conviction), to prove criminal venue.[58] This is a small price to pay in ensuring the constitutional criminal venue protections of Ohio defendants are upheld.[59] Thus, *Foreman* serves as an austere reminder to prosecutors throughout Ohio that the Court will not tolerate meager reasoning and investigation on the fundamentals of criminal prosecution.[60] After *Foreman*, options for Ohio prosecutors are threefold. Either prosecute the accused in the county in which they are actually found to have possessed the drug, obtain a waiver of venue to prosecute them in a desired county, or come to court with sufficient corroborating circumstances to establish criminal venue in a particular county.[61] Therefore, a positive drug test, by itself, is not sufficient to establish criminal venue.

V. CONCLUSION

Foreman is a seminal decision that reaffirms the importance of proving criminal venue beyond a reasonable doubt in the State of Ohio, and upholds the constitutional guarantees bestowed upon Ohio citizens.[62] The Court's holding was unequivocally the correct one, as holding otherwise would have deeply disturbing consequences that would allow prosecutors across the state to charge persons who test positive for drugs in any and all counties they so choose.[63] Such consequences would render proving criminal venue in cases like the one at bar little more than a formality, as metabolites that take long periods of time to flush from the body could theoretically subject a drug user to criminal charges in any Ohio county in which they choose to travel.[64] Perhaps even more disturbingly, such a holding would be inconsistent with the plain meaning of the words "possession" and "control," resulting in an unfaithful judicial construction of the words drafted by the Ohio legislature.[65] Lastly, this decision is consistent with a strong and pervasive body of case law that has rippled through the highest state courts throughout the country over the span of decades, further bolstering the decision's legitimacy.[66]

KRISTOFER A. KRISTOFFERSON

58. *Supreme Court of Ohio, Case No. 2020-0866 State v. Foreman*, THE OHIO CHANNEL (May 12, 2021), https://ohiochannel.org/video/supreme-court-of-ohio-case-no-2020-0866-state-v-foreman.
59. OHIO CONST. art. I, § 10.
60. *See generally Foreman*, 2021-Ohio-3409.
61. *See supra* Part I.
62. *Foreman*, 2021-Ohio-3409 at ¶ 31; OHIO CONST. art. I, § 10.
63. *See supra* Part IV. C.
64. *Id.*
65. *See supra* Part IV. A.
66. *See supra* Part IV. B.