[Cite as *State v. Newman*, 2016-Ohio-7498.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WESLEY R. NEWMAN

Defendant-Appellant

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. CT2016-0002

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. CR2015-0187

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: October 14, 2016

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Wesley R. Newman appeals his conviction and sentence on four counts of trafficking in drugs entered December 15, 2015, in the Muskingum County Common Pleas Court following a plea of no contest.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The undisputed facts and procedural history are as follows:

{¶4} On June 3, 2015, Appellant Wesley R. Newman was indicted for one count of third-degree felony trafficking in cocaine, and three counts of first-degree felony trafficking in cocaine, in violation of R.C. §2925.03(A)(l). One of the first-degree-felony counts included a major-drug-offender specification.

{¶5} On December 15, 2015, Appellant entered a plea of no contest and was found guilty of all four counts.

{¶6} Pursuant to the case of *State of Ohio v. Gonzales,* counsel for Appellant made an oral motion that the absence of quantitative testing regarding the purity of the substances sold or offered to be sold by Appellant require that he be convicted of and sentenced to the lowest degree of the offense of Trafficking in Cocaine, to-wit, a felony of the fifth degree.

{¶7} Immediately prior to the trial court's acceptance of Appellant's no-contest pleas, the State noted that "[Appellant] is preserving his right to appeal any adverse ruling on his previous motion and argument pursuant to *State of Ohio vs. Gonzales*." (T. at 5.) Appellant's plea form states the same: "Defendant preserves his right to appeal any adverse ruling on his motion and argument, pursuant to *State of Ohio v. Gonzales*, that

the absence of quantitative testing regarding the purity of the substances sold or offered to be sold by Defendant requires that he be convicted of and sentenced for the lowest degree of the offense of trafficking in cocaine, to wit, a fifth degree felony."

{¶8} After Appellant pled no contest, the State explained the allegations contained in the indictment. (T. at 14-15.) Three of the counts were based on a confidential informant, directly or indirectly, buying from Appellant, and one count involved Appellant making arrangements to sell to the same confidential informant. (T. at 14-15.) The four counts involved cocaine containing substances in the amounts of roughly 14, 28, 28, and 120 grams, respectively. Both parties stipulated to the admission of the lab reports from the Bureau of Criminal Investigation ("BCI"), which were also attached to the plea form. (T. at 4-5, 16.) The BCI reports included gross weights for the cocaine-containing substances at issue, as well as findings that the substances contained cocaine.

{¶9} By Judgment Entry filed December 15, 2015, the trial court denied Appellant's motion and sentenced him to two (2) years for the third-degree-felony and eleven (11) mandatory years for each of the first-degree felonies, to be served concurrently for an aggregate sentence of 11 mandatory years in prison.

{¶10} It is from this judgment entry that Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶11} "I. THE TRIAL COURT ERRED WHEN IT CONVICTED MR. NEWMAN OF ENHANCED-DEGREE FELONIES FOR TRAFFICKING IN COCAINE BASED ON GROSS WEIGHT THAT INCLUDED OTHER MATERIAL, INSTEAD OF THE WEIGHT

OF ACTUAL COCAINE, IN VIOLATION OF HIS RIGHT TO DUE PROCESS. FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶12} "II. MR. NEWMAN ENTERED HIS NO-CONTEST PLEAS BASED ON THE BELIEF HELD BY THE TRIAL COURT, THE STATE, AND DEFENSE COUNSEL, THAT OHIO LAW PERMITTED HIM TO APPEAL THE ENHANCED-PENALTY SENTENCES ORDERED BY THE TRIAL COURT. CONSEQUENTLY, MR. NEWMAN'S NO-CONTEST PLEAS WERE NOT KNOWINGLY OR INTELLIGENTLY ENTERED. FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION; CRIM.R. 11.

{¶13} "III. MR. NEWMAN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO DEFENSE COUNSEL'S ERRONEOUS ADVICE THAT HE ENTER NO-CONTEST PLEAS TO PRESERVE THE RIGHT TO APPEAL HIS ENHANCED-PENALTY SENTENCES. SIXTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

I.

{¶14} In Appellant's First Assignment of Error he argues that the trial court erred in convicting and sentencing him for enhanced-degree felonies. We disagree.

{¶15} Appellant herein asserts the State failed to present any evidence regarding the purity of the cocaine-containing substance at issue, and therefore there was no evidence of the weight of the actual cocaine. Appellant argues that he could therefore be convicted of, at most, fifth-degree felony trafficking in cocaine.

{¶16} Appellant cites the case of *State of Ohio v. Gonzales*, in support of his argument that the absence of quantitative testing regarding the purity of the substances sold or offered to be sold by a defendant requires that he be convicted of and sentenced to the lowest degree of the offense.

{¶17} The issue of whether the state, in prosecuting cocaine offenses involving mixed substances under R.C. §2925.11(C)(4)(a) through (f), must prove that the weight of the cocaine meets the statutory threshold, excluding the weight of any filler materials used in the mixture, is currently before the Ohio Supreme Court on a certified conflict between the decision of the Sixth District in *State v. Gonzales,* 6th Dist. Wood No. WD–13–086, 2015–Ohio–461, and the decision of the Second District in *State v. Smith,* 2nd Dist. Greene No. 2010–CA–36, 2011–Ohio–2658. Appellant concedes that this Court has previously ruled that in order to sustain a conviction for trafficking in cocaine, with the offense elevated from offer to sell a controlled substance based on the offered substance being cocaine and with a major drug offender specification based on weight of the drug compound, the State is required to prove the identity and a detectable amount of a controlled substance. *State v. Chandler,* 5th Dist. Stark No. 2003-CA-00342, 157 Ohio App.3d 672, 2004-Ohio-3436, 813 N.E.2d 65, *aff'd,* 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234; *State v. Reese*, 5th Dist. Muskingum No. CT2015-0046, 2016-Ohio-1591.

{¶18} Appellant's assignment of error is accordingly overruled on the authority of *Chandler.*

{¶19} Appellant’s First Assignment of Error is overruled.

II.

{¶20} In his Second Assignment of Error, Appellant argues that his plea was not knowingly and voluntarily made. We disagree.

{¶21} More specifically, Appellant argues that he entered his plea under the "belief that his no-contest pleas preserved his ability to appeal" his sentences. *Gonzales*, *supra*. (Appellant's Brief at 6).

{¶22} As this Court has accepted Appellant's appeal and considered his argument under *Gonzales* in the first assignment of error, we find Appellant's second assignment not-well taken,

{¶23} Appellant's Second Assignment of Error is overruled.

III.

{¶24} In his Third Assignment of Error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶25} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In assessing such claims, "a court must indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, 104 S.Ct. 2052, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

{¶26} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same

way." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052.

{¶27} Even if a defendant shows counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S .Ct.2052.

{¶28} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *State v. Bradley,* 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989) quoting *Strickland* at 697, 104 S.Ct. 2052.

{¶29} In this instant case, this assignment of error is also predicated on this Court's determination of whether Appellant is permitted to appeal his sentences in this matter. Appellant argues that his counsel advised him that in entering a no-contest plea in this matter, he was still preserving his right to appeal his sentences and that if this Court finds otherwise, his counsel was ineffective.

{¶30} Again, this Court has found that Appellant did preserve his right to appeal. We therefore find that Appellant has failed to show prejudice or how his counsel's performance was deficient.

{¶31} Appellant's Third Assignment of Error is overruled.

{¶32} For the foregoing reasons, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0919