

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2015-06-057
- vs -	:	<u>OPINION</u> 10/13/2015
HAITHAM M. SHALASH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case No. 12CR28291

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Haitham M. Shalash, #A687831, Noble Correctional Institution, 15708 McConnelsville Road, Caldwell, Ohio 43724, defendant-appellant, pro se

**HENDRICKSON, J.**

{¶ 1} Defendant-appellant, Haitham M. Shalash, appeals pro se from a decision of the Warren County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea.<sup>1</sup> For the reasons set forth below, we affirm.

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1. Pursuant to Loc.R. 6(A), we sua sponte remove this case from the accelerated calendar and place it on the regular calendar for purposes of issuing this opinion.

{¶ 2} In May 2012, appellant was indicted on three counts of aggravated trafficking in a controlled substance analog in violation of R.C. 2925.03(A)(1), three counts of aggravated trafficking in a controlled substance analog in violation of R.C. 2925.03(A)(2), with one count specifying that appellant was a major drug offender, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). The charges arose out of allegations that on January 18, 2012, and February 13, 2012, appellant and a co-defendant, Hazma Shalash, sold "designer" or "synthetic" drugs that were substantially similar to controlled substances out of a local gas station.

{¶ 3} In January 2013, appellant filed a motion to dismiss the indictment, arguing that R.C. 3719.01(HH), the statute defining controlled substance analogs, was unreasonably vague as it failed to portray to a reasonable person the types of substances it intended to ban. The trial court denied appellant's motion in February 2013.

{¶ 4} Thereafter, on August 12, 2013, following plea negotiations, appellant pled guilty to three counts of aggravated trafficking in a controlled substance analog in violation of R.C. 2925.03(A)(1), felonies of the fourth degree, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), a felony of the first degree. In exchange for appellant's guilty plea, the state dismissed the remaining three counts of aggravated trafficking, including the major drug offender specification. The trial court accepted appellant's guilty plea and sentenced him to a total of five years in prison, with four years being mandatory.

{¶ 5} Nearly 18 months later, on January 14, 2015, appellant filed a motion to withdraw his guilty plea. In his motion, appellant argued he should be permitted to withdraw his plea because the sale of controlled substance analogs had not been criminalized at the time he was alleged to have sold the synthetic drugs. Appellant further argued he should be permitted to withdraw his plea because his trial counsel provided ineffective assistance by

failing to discover or advise him that the sale of controlled substance analogs had not been criminalized in January and February 2012, the time frame in which he was alleged to have trafficked in such substances. Appellant did not attach affidavits or other evidence in support of his motion.

{¶ 6} On January 16, 2015, the trial court denied appellant's motion without holding a hearing. The court found appellant had not set forth operative facts to support his motion and had not demonstrated a fundamental flaw in the proceedings that resulted in a manifest injustice.

{¶ 7} Appellant appealed the trial court's decision, raising three assignments of error. As appellant's assignments of error are interrelated, we shall address them together.

{¶ 8} Assignment of Error No. 1:

{¶ 9} APPELLANT'S CONVICTION AND SENTENCE IS IN VIOLATION OF THE EX POST FACTO CLAUSE.

{¶ 10} Assignment of Error No. 2:

{¶ 11} APPELLANT'S [SIC] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶ 12} Assignment of Error No. 3:

{¶ 13} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S JANUARY 14, 2015 MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶ 14} Pursuant to Crim.R. 32.1, "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." A defendant who seeks to withdraw a plea after the imposition of a sentence has the burden of establishing the existence of a manifest injustice. *State v. Williams*, 12th Dist. Clermont No. CA2012-08-060, 2013-Ohio-1387, ¶ 11, citing *State v.*

*Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. A manifest injustice is defined as "a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Hobbs*, 12th Dist. Warren No. CA2012-11-117, 2013-Ohio-3089, ¶ 9. "The requirement of demonstrating a manifest injustice is designed to discourage a defendant from pleading guilty to test the weight of the potential reprisal, and later attempting to withdraw the plea if the sentence was unexpectedly severe." *Williams* at ¶ 13. This sets forth an extremely high standard that is allowable only in extraordinary cases. *State v. Sturgill*, 12th Dist. Clermont No. CA2014-09-066, 2015-Ohio-1933, ¶ 9.

{¶ 15} "A trial court's decision regarding a post-sentence motion to withdraw a guilty plea is reviewed on appeal under an abuse of discretion standard." *State v. Rose*, 12th Dist. Butler CA2010-03-059, 2010-Ohio-5669, ¶ 15. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Robinson*, 12th Dist. Butler No. CA2013-05-085, 2013-Ohio-5672, ¶ 14.

{¶ 16} Ineffective assistance of counsel is a proper basis for seeking a post-sentence withdrawal of a guilty plea. *Id.* at ¶ 22; *Sturgill* at ¶ 12. When an alleged error underlying a motion to withdraw a guilty plea is ineffective assistance of counsel, the defendant must show (1) his counsel's performance was deficient and (2) that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *Id.*; *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052 (1984). Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment. *Robinson* at ¶ 22; *Sturgill* at ¶ 12.

{¶ 17} Here, appellant contends the trial court erred when it denied his motion to withdraw his guilty plea as the sale of controlled substance analogs was not criminalized until

December of 2012, almost a year *after* he was alleged to have sold the substances. In support of his argument, appellant relies on *State v. Smith*, 10th Dist. Franklin Nos. 14AP-154 and 14AP-155, 2014-Ohio-5303. In *Smith*, the state appealed the dismissal of multiple indictments charging the defendant with trafficking and possessing controlled substance analogs between February 2012 and July 2012, in violation of R.C. 2925.01. *Id.* at ¶ 2. After examining 2011 Am.Sub.H.B. No. 64 (House Bill 64), the law that was in effect at the time the defendant was alleged to have possessed and trafficked in controlled substance analogs, the Tenth District concluded that the law did not state a positive prohibition or provide a penalty for violating such prohibition on the possession or sale of controlled substance analogs. *Id.* at ¶ 16. The Tenth District found no error in the trial court's decision to dismiss the indictment, holding that "the acts [the defendant] is alleged to have committed were not clearly defined as criminal offenses under the law as it existed at the time." *Id.*

{¶ 18} This court recently examined the holding of the *Smith* court in *State v. Shalash*, 12th Dist. Warren No. CA2014-12-146, 2015-Ohio-3836. In *Shalash*, appellant's co-defendant, Hazma, made the same ex post facto argument appellant presents today. After analyzing House Bill 64, we rejected Hazma's argument and the holding of the *Smith* court. *Shalash* at ¶ 20-28. We concluded that "[t]he plain and clear language of R.C. 3719.013 incorporated controlled substance analogs into every other chapter of the Revised Code, including R.C. Chapter 2925. Therefore, the sale or possession of controlled substance analogs was criminalized as of October 17, 2011, the date House Bill 64 became effective." *Id.* at ¶ 24.<sup>2</sup> Hazma's convictions for aggravated trafficking in controlled substance analogs between January and February 2012 were, therefore, upheld. *Id.* at ¶ 1.

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2. House Bill 64 added R.C. 3719.013, which provided that "[a] controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of *any* provision of the Revised Code as a controlled substance in schedule I." (Emphasis added.)

{¶ 19} For the reasons set forth in *Shalash*, we find appellant's argument that his conviction and sentence violates the ex post facto clauses of the United States and Ohio Constitutions to be without merit. The sale or possession of controlled substance analogs was criminalized by House Bill 64, which was in effect well before appellant trafficked in the substances in January and February 2012.

{¶ 20} We also find appellant's argument that his trial counsel provided ineffective assistance to be without merit. Essentially, appellant argues his counsel was deficient for not discovering or arguing that the sale of controlled substance analogs was legal in January and February 2012. Appellant contends that had this argument been set forth in his motion to dismiss, the motion would have been granted, the indictment dismissed, and he never would have entered a guilty plea to the charges.

{¶ 21} Appellant's claim of ineffective assistance of counsel fails as he cannot establish that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. See also *State v. Madrigal*, 87 Ohio St.3d 378, 389 (2000) (holding that a defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong). Even if we were to assume trial counsel's performance was deficient for failing to advise appellant about appellant's ability to challenge the indictment on the basis that House Bill 64 did not criminalize the sale of controlled substance analogs, appellant cannot demonstrate any prejudice. As discussed above, this court has determined that the sale or possession of controlled substance analogs was criminalized by House Bill 64. Appellant, therefore, could not have prevailed on a motion to dismiss as trafficking in controlled substance analogs was a crime as of October 17, 2011.

{¶ 22} Accordingly, for the reasons set forth above, we conclude that the trial court did not error in denying appellant's motion to withdraw his guilty plea. Appellant failed to demonstrate his trial counsel was ineffective or that there was some fundamental flaw in the

underlying proceedings that resulted in a manifest injustice. Appellant's first, second, and third assignments of error are, therefore, overruled.

{¶ 23} Judgment affirmed.

S. POWELL, P.J., and RINGLAND, J., concur.