

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellant	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 17-CA-71
MALIK AHMAD	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Licking County
Court of Common Pleas, Case No.
16CR437

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 11, 2018

APPEARANCES:

For Plaintiff-Appellant

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Gwin, P.J.

{¶1} Appellant Malik Ahmad [“Ahmad”] appeals the May 16, 2017 Judgment Entry of the Licking County Court of Common Pleas overruling his motion to withdraw his guilty plea.

Facts and Procedural History

{¶2} Ahmad entered a negotiated plea of guilty to Count One—Possession of Cocaine, Count Four—Possession of Heroin, and Count Six—Resisting Arrest. (T. at 15, 18). See, *State v. Ahmad*, 5th Dist. Licking No. 16-CA-92, 2017-Ohio-6991 [*Ahmad I.*]. The trial court sentenced Ahmad to eight years in prison on Count One, one year in prison on Count Four, and thirty days in jail on Count Six. Counts One and Four were to be served consecutively and Count Six was to be served concurrently, for a total prison term of nine years. The sentencing entry was filed on October 24, 2016. This Court affirmed Ahmad’s convictions and sentences. *Ahmad I.*

{¶3} During the pendency of the direct appeal, on April 16, 2017 Ahmad filed a motion to withdraw his guilty plea. The trial court overruled the motion by Judgment Entry filed May 16, 2017. Ahmad attempted to appeal the trial court’s May 16, 2017 Judgment Entry. In *State v. Ahmad*, 5th Dist. Licking No. 17-40, this Court dismissed Ahmad’s appeal for failure to follow Local Rules of Court. Ahmad filed a pro se Motion for a Delayed Appeal with this Court on September 1, 2017.¹ This Court granted the motion to file a delayed appeal by Judgment Entry filed October 6, 2017.

Assignments of Error

{¶4} Ahmad raises five assignments of error,

¹We note that the State submits that the motion was not served upon the prosecuting attorney in accordance with App.R. 5(A)(2).

{¶5} “I. THE FAILURE OF FORENSIC SCIENTIST TO PROPERLY FOLLOW THE PROTOCOLS SET FORTH IN 2925.51 VIOLATED APPELLANT’S DUE PROCESS PROTECTIONS OF THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION.

{¶6} “II. TRIAL COUNSEL FAILED IN HIS ESSENTIAL DUTIES TO APPELLANT/CLIENT.

{¶7} “III. APPELLANT SUFFERED UNCONSTITUTIONAL PREJUDICE AS A RESULT OF PROSECUTOR’S ACTIONS/INACTION.

{¶8} “IV. APPELLANT’S RIGHTS UNDER THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION WERE ARBITRARILY DENIED WHILE ALLOWING OTHERS IN AN IDENTICAL OR SIMILAR CIRCUMSTANCE THE OPPORTUNITY FOR REDRESS AND REMEDY IN THE TRIAL COURTS AND COURT OF APPEALS.

{¶9} “V. APPELLANT’S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY OR INTELLIGENTLY ENTERED.”

I, III & V.

{¶10} In his first assignment of error, Ahmad claims that the forensic scientist who examined and administered the testing of the drugs found in his possession failed to properly follow the protocols set forth in R.C. 2925.51. In his third assignment of error, Ahmad alleges that he was prejudiced by the prosecutor omitting facts in the state’s bill of particulars, specifically that the weight of the drugs tested included the weight of the “fillers” or non-controlled substances. In his fifth assignment of error, Ahmad contends that his plea was not knowing, intelligent and voluntary.

Standard of Appellate Review

{¶11} The entry of a plea of guilty is a grave decision by an accused to dispense with a trial and allow the state to obtain a conviction without following the otherwise difficult process of proving his guilt beyond a reasonable doubt. See *Machibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473(1962). A plea of guilty constitutes a complete admission of guilt. Crim. R. 11 (B) (1). “By entering a plea of guilty, the accused is not simply stating that he did the discreet acts described in the indictment; he is admitting guilt of a substantive crime.” *United v. Broce*, 488 U.S. 563, 570, 109 S.Ct. 757, 762(1989).

{¶12} The United States Supreme Court emphasizes that a criminal defendant, who has pled guilty on the advice of counsel, waives any non-jurisdictional, constitutional challenge he might have and may attack only the nature of his plea:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). The Court has reiterated the principle set forth in *Tollett* on several occasions. See, e.g., *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989)

("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary."); *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437(1984) (citing *Tollett* and other cases) ("It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."). As noted by our brethren in the Twelfth District,

Consequently, there is no evidence to consider, and the trial court was not required to determine whether a factual basis existed to support the guilty plea, prior to entering judgment on that plea. See *State v. Caldwell* (2001), Butler App. No. CA99-08-144, citing *State v. Wood* (1976), 48 Ohio App.2d 339, 344, 357 N.E.2d 1106. Appellant's plea provides the necessary proof of the elements of the crime and sufficient evidence to support the conviction.

State v. Isbell, 12th Dist. Butler No. CA2003-06-152, 2004-Ohio-2300, ¶16.

{¶13} "Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack." *United States v. Broce*, 488 U.S. 569, 109 S.Ct. 757, 102 L.Ed.2d 927.

ISSUES FOR APPEAL.

A. Whether the forensic scientist who examined and administered the testing of the drugs found in his possession failed to properly follow the protocols set forth in ORC 2925.51.

B. Whether Ahmad was prejudiced by the prosecutor omitting facts in the state's bill of particulars, specifically that the weight of the drugs tested included the weight of the “fillers” or non-controlled substances.

{¶14} In the case at bar, Ahmad entered a negotiated guilty plea on the record in open court. In exchange, count five of the indictment was dismissed. *Ahmad I*, ¶36. The trial court was not required to determine whether a factual basis existed to support the guilty plea prior to entering judgment on that plea. Ahmad's plea provides the necessary proof of the elements of the crime and sufficient evidence to support the conviction. Accordingly, Ahmad is barred from collaterally attacking his guilty plea on evidentiary grounds.

C. Whether Ahmad's guilty plea was entered knowingly, intelligently and voluntarily.

{¶15} Crim.R. 32.1 provides that a trial court may grant a defendant's post sentence motion to withdraw a guilty plea only to correct a manifest injustice. Therefore, “[a] defendant who seeks to withdraw a plea of guilty after the imposition of sentence has the burden of establishing the existence of manifest injustice.” *State v. Smith*, 49 Ohio St.2d 261,361 N.E.2d 1324(1977), paragraph one of the syllabus. Although no precise definition of “manifest injustice” exists, in general, “manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is

inconsistent with the demands of due process.” *State v. Wooden*, 10th Dist. Franklin No. 03AP–368, 2004–Ohio–588, ¶ 10, *quoting State v. Hall*, 10th Dist. Franklin No. 03AP–433, 2003–Ohio–6939; *see, also, State v. Odoms*, 10th Dist. Franklin No. 04AP–708, 2005–Ohio–4926, *quoting State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83(1998) (“[a] manifest injustice has been defined as a ‘clear or openly unjust act’”). Under this standard, a post sentence withdrawal motion is allowable only in extraordinary cases. *Smith*, 49 Ohio St.2d at 264, 361 N.E.2d 1324.

{¶16} “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court.” *Smith* at paragraph two of the syllabus. Thus, we review a trial court’s denial of a motion to withdraw a guilty plea under an abuse-of-discretion standard, and we reverse that denial only if it is unreasonable, arbitrary, or unconscionable.

{¶17} Crim. R. 11 requires guilty pleas to be made knowingly, intelligently and voluntarily. Although literal compliance with Crim. R. 11 is preferred, the trial court need only “substantially comply” with the rule when dealing with the non-constitutional elements of Crim.R. 11(C). *State v. Ballard*, 66 Ohio St.2d 473, 475, 423 N.E.2d 115(1981), citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163(1977). In *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 12, the Ohio Supreme Court noted the following test for determining substantial compliance with Crim.R. 11:

Though failure to adequately inform a defendant of his constitutional rights would invalidate a guilty plea under a presumption that it was entered involuntarily and unknowingly, failure to comply with non-constitutional

rights will not invalidate a plea unless the defendant thereby suffered prejudice.[*State v. Nero* (1990), 56 Ohio St.3d 106,] 108, 564 N.E.2d 474. The test for prejudice is ‘whether the plea would have otherwise been made.’ *Id.* Under the substantial-compliance standard, we review the totality of circumstances surrounding [the defendant’s] plea and determine whether he subjectively understood [the effect of his plea]. See, *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509 at ¶ 19-20.

{¶18} In determining whether the trial court has satisfied its duties under Crim.R. 11 in taking a plea, reviewing courts have distinguished between constitutional and non-constitutional rights. *State v. Clark*, 119 Ohio St.3d 239, 893 N.E.2d 462, 2008-Ohio-3748, ¶ 32; *State v. Aleshire*, Licking App. No. 2007-CA-1, 2008-Ohio-5688 at ¶ 10. The trial court must strictly comply with those provisions of Crim.R. 11(C) that relate to the waiver of constitutional rights. *State v. Clark*, 119 Ohio St.3d at 244, 893 N.E.2d at 499, 2008-Ohio-3748, ¶ 31.

{¶19} In *Clark*, a case decided after *Sarkozy*, the Ohio Supreme Court concluded that “[i]f a trial judge, in conducting a plea colloquy, imperfectly explains non-constitutional rights such as the right to be informed of the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies on appellate review; under this standard, a slight deviation from the text of the governing rule is permissible, and so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving, the plea may be upheld.” *Id.* at ¶31, 881 N.E.2d 1224. Thus, in *Clark*, the Ohio Supreme Court concluded that the right to be informed of the maximum possible penalty and the effect of the plea are subject to the

substantial compliance test. 119 Ohio St.3d at 244, 893 N.E.2d at 469, 2008-Ohio-3748 at ¶ 31. (Citations omitted).

{¶20} In the present appeal, Ahmad filed a direct appeal from the entry of his negotiated guilty plea. Under the doctrine of res judicata, a defendant cannot raise an issue in a post-conviction petition if he or she raised or could have raised the issue at the trial that resulted in that judgment of conviction or on an appeal from that judgment. *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 671 N.E.2d 233 (1996); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶21} In the direct appeal, Ahmad was represented by counsel that had not represented him at trial. In his direct appeal, Ahmad attacked the validity of the negotiated guilty plea and the effectiveness of his trial counsel. In addition, Ahmad told the trial court he was entering his plea “freely and voluntarily knowing what [his] rights are [.]” T. at 15. He further told the trial court that he discussed the facts and circumstances of his case, along with all of his possible defenses fully and completely with his trial counsel. T. at 15. Ahmad told the court that he was in good physical and mental health, not under the care of a doctor for any reason, and was not under the influence of any alcohol or drugs or any medication. T. at 18.

{¶22} The trial court correctly concluded that Ahmad failed to demonstrate the existence of a manifest injustice. Accordingly, Ahmad is precluded from attacking the knowing, intelligent and voluntary nature of his plea under the doctrine of res judicata.

{¶23} Ahmad’s first, third and fifth assignments of error are overruled.

II.

{¶24} In his second assignment of error, Ahmad claims that he was deprived of effective assistance of counsel. He bases this claim on multiple reasons, including an allegation that trial counsel did not adequately prepare him for a suppression hearing, Ahmad was suffering multiple mental health issues and was acting under duress when he pled, and that he was not informed of multiple evidentiary matters.

{¶25} In the direct appeal, Ahmad was represented by counsel that had not represented him at trial. In his direct appeal, Ahmad attacked the validity of the negotiated guilty plea and the effectiveness of his trial counsel. Ahmad told the court that he was in good physical and mental health, not under the care of a doctor for any reason, and was not under the influence of any alcohol or drugs or any medication. T. at 18.

{¶26} Ahmad's claim that he might have had mental health problems is speculative. No evidence is contained within the record to support Ahmad's claims. Ahmad told the trial court he was entering his plea "freely and voluntarily knowing what [his] rights are [.] T. at 15. He further told the trial court that he discussed the facts and circumstances of his case, along with all of his possible defenses fully and completely with his trial counsel. T. at 15. Ahmad told the court that he was in good physical and mental health, not under the care of a doctor for any reason, and was not under the influence of any alcohol or drugs or any medication. T. at 18.

{¶27} Ahmad's reliance upon *State v. Gonzales*, 150 Ohio St.3d 261, 2016-Ohio-8319, 81 N.E.3d 405 ["*Gonzales I*"] must fail as we discuss in our disposition of Ahmad's fourth assignment of error, *infra*.

{¶28} Accordingly, Ahmad is precluded from attacking the effectiveness of his trial counsel under the doctrine of res judicata.

{¶29} Ahmad's second assignment of error is overruled.

IV.

{¶30} In his fourth assignment of error, Ahmad alleges that he should have been granted to the benefit of the Ohio Supreme Court's Ruling in *State v. Gonzales*, 150 Ohio St.3d 261, 2016-Ohio-8319, 81 N.E.3d 405 [*"Gonzales I"*]. However, on February 7, 2017, the Ohio Supreme Court granted the state's motion for reconsideration in *Gonzales I*, vacated their decision in that case, and reversed the judgment of the Sixth District Court of Appeals. *State v. Gonzales*, 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419, ¶ 3 (*"Gonzales II"*). In *Gonzales II*, the Supreme Court held,

We now hold that the entire "compound, mixture, preparation, or substance," including any fillers that are part of the usable drug, must be considered for the purpose of determining the appropriate penalty for cocaine possession under R.C. 2925.11(C)(4).

150 Ohio St.3d 276, ¶3.

{¶31} Ahmad's fourth assignment of error is overruled.

{¶32} The judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur