[Cite as *State v. Hover*, 2020-Ohio-6969.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RANDALL L. HOVER,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case Nos. 19 MA 0035; 19 MA 0036

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case Nos. 17 CR 1320B; 18 CR 809

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Rhys B. Cartwright-Jones, 42 N. Phelps St., Youngstown, OH 44503-1130, for Defendant-Appellant

Dated: December 16, 2020

WAITE, P.J.

{¶1} In this consolidated appeal, Appellant Randall L. Hover appeals sentences imposed by the Mahoning County Common Pleas Court in two criminal matters involving drug possession and related charges. Appellant argues the trial court erred when it did not order a drug purity test requested by Appellant during his Crim.R. 33(A)(1) allocution. Based on the following, we conclude the trial court did not err in denying Appellant's request for a drug purity test and proceeding with sentencing. Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This appeal involves two criminal cases: Mahoning County Common Pleas Court Cases number 17 CR 1320B and 18 CR 809. The two matters were heard on the same day and sentencing entries for both were issued by the same trial court on the same day. The cases have been consolidated on appeal.

{¶3} In 17 CR 1320B, the Youngstown Police Department executed a search warrant of Appellant's home on November 29, 2017. When executing the search warrant, officers observed Appellant throw a plastic bag from a second-story window onto the driveway. The police officers cleared and secured the house. Appellant was found in the second floor bathroom, the room from which the bag was thrown. The officers collected the bag from the driveway, collected evidence from a vehicle parked in the driveway, and collected additional evidence in the house. The evidence was sent to a lab. The results revealed 1.52 grams of crack cocaine collected in the upstairs bathroom; 10.77 grams of

heroin, .2 grams of cocaine and 6 Adderall pills from the bag thrown out of the window; two Tramadol pills located on the bathroom window sill; and six Tramadol pills collected from inside the vehicle. Officers also found a sawed-off shot gun in the dining room of the house with a barrel of less than 18 inches, making it a dangerous ordnance. A loaded Ruger .38 pistol was also recovered within four feet of the sawed-off shotgun. At the time of the search, Appellant was subject to a weapons disability from his previous drug trafficking offenses. Officers also found $231 in cash on Appellant's person when he was arrested after the search. On December 29, 2017, Appellant was indicted as follows: count 1, possession of heroin in violation of R.C. 2925.11(A)(C)(6)(d), a second-degree felony; count 2, tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony; counts 3 and 4, having weapons under disability in violation of R.C. 2923.13(A)(1)(3)(B), both third-degree felonies; count 5, aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a fifth-degree felony; count 6, possession of cocaine, in violation of R.C. 2925.11(A)(C)(4)(a), a fifth-degree felony; count 7, aggravated possession of drugs in violation of R.C. 2925.11(A)(C)(1)(a), a fifth-degree felony; count 8, possession of drugs in violation of R.C. 2925.11(A)(C)(2)(a), a fifth-degree felony; and count 9, unlawful possession of a dangerous ordnance, in violation of R.C. 2923.17(A), a fifth-degree felony. Forfeiture specifications, in violation of R.C. 2941.1417, attached to counts 1, 6, 7 and 8.

{¶4} Turning to case number 18 CR 809, on May 15, 2018, while Appellant was out on bond in case number 17 CR 1320B, another search warrant was obtained and executed by the Youngstown Police Department at another home where Appellant was then residing. During the search, police recovered from a kitchen cabinet a digital scale

with residue; one heroin metal press (with residue) from a kitchen cabinet; one bag of heroin from a kitchen cabinet; 30 Tramadol tablets from a kitchen cabinet; and one bag of crack cocaine from a bedroom shelf. In addition, 107 Tramadol tablets and 13 baggies of crack cocaine were found in Appellant's pockets when he was taken into custody. On September 6, 2018, Appellant was indicted on the following: count 1, possession of heroin in violation of R.C. 2925.11(A)(C)(6)(d), a second-degree felony; count 2, possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(a), a fifth-degree felony; count 3, possession of drugs in violation of R.C. 2925.11(A)(C)(2)(a), a fifth-degree felony; and count 4, possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor.

{¶5} On February 11, 2019, Appellant pleaded guilty to all counts in case number 2017 CR 1320B with the exception of count 5, which was dismissed by the state because lab tests results revealed the substance recovered was cocaine and not fentanyl. On the same day, Appellant pleaded guilty to all counts in case number 2018 CR 809.

{¶6} On March 21, 2019, both matters came on for sentencing. The record reveals a lengthy colloquy with Appellant was conducted by the trial court judge. Defense counsel and Appellant were also provided the opportunity to speak to the court at length regarding circumstances which could mitigate sentencing. At the conclusion of the hearing, Appellant was sentenced in case number 2017 CR 1320B as follows: five (5) years of imprisonment on count 1; two (2) years on count 2 to run concurrently with count 1; counts 3 and 4 merged for sentencing purposes; a six-month prison term on counts 6, 7, 8, and 9, concurrent with each other and concurrent with all other Counts. Hence, he was sentenced to a total prison term of five (5) years.

{¶7} Appellant was sentenced in case number 2018 CR 809 to five (5) years of imprisonment on count 1 and six months on counts 2 & 3 to run concurrently with each other and concurrent with count 1. Appellant's sentence on count 4 was suspended. Thus, in this case Appellant received a total stated prison term of five years.

{¶8} The court ordered the sentences in 2017 CR 1320B and 2018 CR 809 to be served concurrently.

{¶9} Appellant filed this timely appeal.

ASSIGNMENT OF ERROR

The trial court erred plainly in not ordering a purity test of the drugs at issue.

{¶10} Appellant contends the trial court erred in not ordering a drug purity test that he requested during his allocution at sentencing. He contends that this failure amounted to a violation of his right to allocution and to present evidence on his own behalf.

{¶11} Crim.R. 32(A)(1) provides a criminal defendant with the right to allocution:

> At the time of imposing sentence, the court shall * * *:
>
> (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

{¶12} A Crim.R. 32 inquiry is "much more than an empty ritual; it represents a defendant's last opportunity to plead his case or express remorse." *State v. Jones,* 7th Dist. Belmont No. 02 BE 65, 2003-Ohio-3285, ¶ 46, citing *State v. Green,* 90 Ohio St.3d

352, 359-360, 738 N.E.2d 1208 (2000). If a trial court imposes sentence without first asking the defendant whether he wishes to exercise his right to allocution, resentencing is required unless there is harmless error or invited error. *State v. Campbell,* 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178, paragraph three of the syllabus.

{¶13} In the instant matter, Appellant appears to concede that the trial court provided him with a right to allocution. A review of the record reveals the trial court clearly afforded Appellant the opportunity to make a statement on his own behalf prior to imposing sentence. Both defense counsel and Appellant made lengthy statements in support of Appellant and in mitigation of his punishment. Appellant does not dispute that he was provided the right to allocution. Instead, he takes issue with the trial court's denial of his request for a drug purity test, a request made for the first time to the court at sentencing. Appellant explains that, in an attempt to mitigate his sentence, he sought a drug purity test in order to determine the specific amount of illicit drugs contained within the mixed substances recovered in both cases. The following exchange occurred at the sentencing hearing:

> **THE DEFENDANT**: I've been asking for a purity test on these drugs since September, beginning in September, late August, the beginning of September, since [defense counsel] was my attorney, and then shortly after he withdrew as counsel, then he became my counsel. I even asked him about having a purity test done, and one still has not been done. This –
>
> **THE COURT**: A purity test?
>
> **THE DEFENDANT**: Yes

THE COURT: [Prosecutor]

[**PROSECUTOR**]: He can ask for a purity test all he wants. The statute covers a mixture. So if I have one gram of coke mixed in with ten grams of cut, I get eleven grams and I made weight. The statute covers that specific scenario, and there's plenty of case law demonstrating that that is a constitutional statute. It does not matter what the purity is. The statute covers a mixture.

THE COURT: And I'm looking at the offense that you pled to, weapons under disability, you know. That's very important to me. Almost as equally important as any of these drugs. Two different counts of possession of heroin, possession of cocaine. It's not any amount specifically that I am concerned with. It's the mixture of them all.

THE DEFENDANT: Right.

THE COURT: So with regard to the purity test, I guess the state of Ohio's point is well taken; that, you know, I read the reports now. I've read everything. And it's not that you had so much of one. It's that you had so many, number one; you had weapons with it, number two; and you had drugs while you were awaiting hearing on the case where you allegedly had drugs. So it might help ease your worry about it or answer any questions going on in your mind, I'm not making my decision today for sentencing

based upon only or primarily or even, most importantly, the amount or the purity of the amounts. Does that help?

THE DEFENDANT: So understanding, yes.

THE COURT: Anything else you want to talk to me about?

THE DEFENDANT: That the --- that the court show leniency.

(3/21/19 Tr., pp. 6-8.)

{¶14} Thus, pursuant to Crim.R. 32(A)(1), Appellant was clearly provided with the opportunity to speak on his own behalf and offer mitigation information prior to imposition of his sentence. The right of allocution does not include the requirement that the trial court adjourn proceedings and conduct additional testing or grant any request made by the defendant during that allocution, particularly if such a request has no basis in law to allow for mitigation. To the extent that Appellant contends that the trial court erred in not ordering a purity test because it might result in mitigation of his sentence, that issue has been addressed by the Ohio Supreme Court. In *State v. Gonzales,* 150 Ohio St.3d 276, 2017-Ohio-777, 81 N.E.3d 419 (*Gonzales II)*, the court held 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[.]" *Id.* at ¶ 3. Previously, the Ohio Supreme Court had concluded that only the weight of the pure cocaine, and not any filler material, was considered when determining the threshold for penalty enhancement. *State v. Gonzales,* 150 Ohio St.3d 261, 2016-Ohio-8319 (*Gonzales I)*. A short time later, in *Gonzales II*, the Court overturned

its earlier decision, concluding that for penalty enhancement purposes, the amount of cocaine included pure cocaine as well as any additives or fillers. *Id.* at ¶ 9. We recognized the holding in *Gonzales II* in *State v. Henry,* 7th Dist. Jefferson No. 16 JE 0010, 2017-Ohio-7505. "Fillers are permitted to contribute to the weight of the drug in determining the applicable offense level." *Id.* at ¶ 30. Appellant's assertions are not persuasive for two reasons. First, the record clearly shows that Appellant was provided, and exercised, his right to allocution. Second, the purity testing Appellant requested would not provide a basis for mitigation of sentence pursuant to *Gonzales II* and our holding in *Henry*, as the purity of the drug has no effect on the weight of the drug when determining applicable levels of a drug offense. Appellant's assignment of error is without merit and is overruled.

{¶15} Based on the foregoing, Appellant's assignment of error is without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.