

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-883 (C.P.C. No. 08CR-07-5001)
Craig V. Miles,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 8, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Madison & Rosan, LLP, and *Kristin E. Rosan*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Craig V. Miles, appeals from a judgment of the Franklin County Court of Common Pleas overruling his motion for intervention in lieu of conviction, accepting his no contest plea to three counts of trafficking in drugs in violation of R.C. 2925.03, felonies of the fourth degree, and sentencing defendant to two years of community control. Defendant assigns a single error:

The Trial Court Erred As A Matter Of Law When It Denied Appellant's Motion And Found Appellant Ineligible For Intervention In Lieu Of Conviction Pursuant To R.C. 2951.041(B).

Because the trial court properly denied defendant's motion for intervention in lieu of conviction, we affirm.

I. Procedural History

{¶2} By indictment filed on July 9, 2008, defendant was charged with three counts of trafficking in drugs in violation of R.C. 2925.03. According to the state's evidence, defendant sold a Schedule III drug, testosterone, on December 1, 2006, January 9, 2007, and March 1, 2007, from his home to an undercover officer with the Worthington Police Department. Each vial contained approximately 10 milliliters and weighed 9.62 grams, 9.23 grams, and 9.67 grams, respectively. Defendant entered a not guilty plea to the indicted charges and filed a motion for intervention in lieu of conviction on January 13, 2009.

{¶3} On January 26, 2009, the trial court ordered NetCare to conduct an evaluation of defendant. NetCare forwarded a report to the trial court with a letter dated February 20, 2009, concluding defendant to be an appropriate candidate for intervention in lieu of conviction. After the parties filed memoranda regarding the motion, the trial court conducted a motion hearing on July 30, 2009, took the motion under consideration, and issued a written decision on August 27, 2009 overruling defendant's motion.

{¶4} On the same day, the trial court conducted plea proceedings and a sentencing hearing. At the proceedings, defendant indicated he intended to withdraw his

guilty plea and to enter a no contest plea to the three counts of the indictment. The trial court accepted defendant's no contest plea and sentenced defendant accordingly.

II. Assignment of Error

{¶5} In his single assignment of error, defendant contends the trial court erred in concluding defendant is not eligible for intervention in lieu of conviction under R.C. 2951.041(B).

{¶6} "Intervention provides an alternative to prison if the trial court has reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior." *State v. Fritz*, 10th Dist. No. 04AP-63, 2004-Ohio-6129, ¶5. "Intervention reflects the legislature's determination that when drug abuse is the cause or precipitating factor in the commission of an offense, it may be more beneficial to the individual and to the community as a whole to treat the cause rather than punish the crime." *Id.*, citing *State v. Shoaf* (2000), 140 Ohio App.3d 75, 77. Accordingly, "[i]f an offender satisfies all of the statutory eligibility requirements for intervention, the trial court has discretion to determine whether a particular offender is a good candidate for intervention." *Id.*, citing *State v. Wiley*, 10th Dist. No. 03AP-362, 2003-Ohio-6835, ¶3. Nonetheless, a trial court's "application of the statutory eligibility requirements for intervention is a matter of law" subject to this court's de novo review. *Id.*; *State v. Stanovich*, 3d Dist. No. 6-06-10, 2007-Ohio-4234, ¶12.

{¶7} R.C. 2951.041(B) provides that "[a]n offender is eligible for intervention in lieu of conviction if the court finds all" of the provisions of R.C. 2951.041(B)(1) – (9) are met. In resolving defendant's motion, the trial court concluded defendant failed to meet the requirements of R.C. 2951.041(B)(1) and (B)(3).

A. R.C. 2951.041(B)(3)

{¶8} According to R.C. 2951.041(B)(3), an offender is eligible for intervention in lieu of conviction if the court finds "[t]he offender is not charged with a violation of section 2925.02, 2925.03, 2925.04, or 2925.06 of the Revised Code and is not charged with a violation of section 2925.11 of the Revised Code that is a felony of the first, second, or third degree." Defendant inverts that language and contends that to be *ineligible* for intervention in lieu of conviction, he must be charged with (1) a violation of section 2925.02, 2925.03, 2925.04, or 2925.06 and (2) a violation of section 2925.11 that is a felony of the first, second, or third degree. Because defendant was not charged with a violation of section 2925.11 in any degree, defendant contends he is eligible under the provisions of R.C. 2951.041(B)(3).

{¶9} Contrary to defendant's contentions, R.C. 2951.041(B)(3) requires two things for *eligibility*, not for *ineligibility*: (1) a defendant is not charged with a violation of R.C. 2925.03, and (2) a defendant is not charged with a violation of section 2925.11 as a felony of the first, second, or third degree. Because defendant is charged with a violation of R.C. 2925.03, he is ineligible under the statute. The degree to which defendant's argument contradicts the statutory language is evident in the statutory structure.

{¶10} R.C. 2951.041(B) sets forth nine factors, and a court must find a defendant meets all factors to be eligible for intervention in lieu of conviction. The two segments of R.C. 2951.041(B)(3) could have been separated so that one division required the offender not be charged with a violation of R.C. 2925.03 and a separate division specified the offender not be charged with a violation of R.C. 2925.11 as a felony of the first, second, or third degree. Were the requirements of R.C. 2951.041 presented in that

fashion, little doubt would exist that if a defendant were charged with a violation of either R.C. 2925.03 or a violation of 2925.11 as a felony of the first, second, or third degree, the defendant would be ineligible for intervention in lieu of conviction. The current language of R.C. 2951.041(B)(3) is the functional equivalent in that it requires both elements, but rather than present them in separate divisions, the statute combines them into one subsection and plainly includes the word "and."

{¶11} Under the plain language of the statute, defendant is not eligible for intervention in lieu of conviction because he was charged with a violation of R.C. 2951.041(B)(3).

B. R.C. 2951.041(B)(1)

{¶12} R.C. 2951.041(B)(1) states, as relevant here, that an offender is eligible for intervention in lieu of conviction if "[t]he offender * * * is charged with a felony for which the court, upon conviction, would impose sentence under division (B)(2)(b) of section 2929.13 of the Revised Code." Both parties acknowledge defendant's conviction under R.C. 2925.03 is sentenced pursuant to R.C. 2929.13(C). In *Fritz*, supra, this court concluded a defendant whose offense dictates he or she be sentenced under R.C. 2929.13(C) fails to meet the requirements of R.C. 2951.041(B)(1) and therefore is ineligible for intervention in lieu of conviction.

{¶13} Defendant suggests the Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, requires a different result, as the Second District determined in *State v. Cohen*, 2d Dist. No. 07-CA-081, 2008-Ohio-4635. *Cohen*, based on the court's earlier decision in *State v. Jamison* (Mar. 16, 2001), 2d Dist. No. 18509, rejected the state's argument "that a defendant who commits a felony drug offense in

violation of R.C. Chapter 2925, and to whom the sentencing considerations of R.C. 2929.13(C) apply, is ineligible" for intervention in lieu of conviction. *Id.* at ¶8. Instead, the court concluded "the only relevant inquiry, for purposes of [intervention in lieu of conviction] eligibility, was whether the offender, upon conviction, would be eligible for community control." *Id.* Defendant contends that because a defendant post-*Foster* is eligible for community control not only under R.C. 2929.13(B)(2)(b), but also under R.C. 2929.13(C), this court should adopt the reasoning of *Cohen* and conclude defendant is eligible under R.C. 2951.041(B)(1).

{¶14} Despite the analysis in *Cohen*, the statute specifically states a defendant is eligible under section (B)(1) if the sentence would be imposed under R.C. 2929.13(B)(2)(b). "When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply the rules of statutory interpretation." *Fritz* at ¶9. Because "[t]he legislature chose to limit intervention to the class of offenders who would qualify for community control under the specific set of criteria set forth in R.C. 2929.13(B)(2)(b)" we, consistent with *Fritz*, would conclude defendant is ineligible under R.C. 2951.041(B)(1) were we required to reach that issue. *Id.* at ¶10.

{¶15} Accordingly, we overrule defendant's single assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.
