[Cite as *State v. Beavers*, 2012-Ohio-3654.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-1064 (C.P.C. No. 10CR-04-2296)
Kevin J. Beavers,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 14, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Bleile, Witte & Lape, and *Stephenie N. Lape*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Kevin J. Beavers ("appellant"), appeals from a decision of the Franklin County Court of Common Pleas denying his post-sentence motion to withdraw guilty plea. For the reasons that follow, we affirm that judgment.

{¶ 2} On April 12, 2010, appellant was indicted on four counts of importuning and one count of disseminating matter harmful to juveniles. All five charges are felonies of the fifth degree. On November 16, 2010, appellant entered a plea of guilty to one count of importuning and one count of disseminating matter harmful to juveniles. A pre-sentence investigation report was ordered and sentencing was scheduled for January 5, 2011. At the sentencing hearing, appellant was placed on community control (sex offender caseload) for a period of two years. Appellant was also determined to be a Tier I

sexual offender. The conviction and sentence was journalized on January 7, 2011. Appellant did not file an appeal.

{¶ 3} On September 13, 2011, appellant filed a motion to withdraw guilty plea, alleging the criminal statute for disseminating matter harmful to juveniles, R.C. 2907.31, is unconstitutionally void for vagueness, and consequently, appellant should be permitted to withdraw his plea in order to prevent manifest injustice. Plaintiff-appellee, the State of Ohio, filed a memorandum opposing the motion to withdraw guilty plea. On November 8, 2011, the trial court journalized an entry denying the motion to withdraw. This timely appeal now follows in which appellant raises a single assignment of error:

> THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO WITHDRAW PLEA.

{¶ 4} In his sole assignment of error, appellant argues the trial court erred in denying his motion to withdraw guilty plea because the statute on disseminating matter harmful to juveniles is unconstitutionally vague, which in turn renders the statute void and his conviction a manifest injustice. Appellant further argues the presence of manifest injustice negates any timeliness requirement for the filing of his motion to withdraw.

{¶ 5} Appellant's void-for-vagueness argument focuses specifically on the affirmative defense provision found in R.C. 2907.31(C)(1), which sets forth an affirmative defense to the offense if the material was "presented for a bona fide medical, scientific, educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person."

{¶ 6} Appellant argues the term "other proper purpose" as used in this provision is not defined, nor is "a bona fide medical, scientific, educational, governmental, [or] judicial [purpose]." Appellant contends this failure forces persons engaging in the activities described in R.C. 2907.31(A) to have to guess as to whether or not their conduct constitutes a "proper purpose." Consequently, appellant submits the statute does not provide a person of ordinary intelligence with fair notice that his or her contemplated conduct is prohibited by the statute, and therefore, the statute is unconstitutionally vague, and the trial court abused its discretion in denying appellant's post-sentence motion to withdraw guilty plea. We disagree.

{¶ 7} A post-sentence motion to withdraw guilty plea may be made only to correct a manifest injustice. Crim.R. 32.1. Therefore, the trial court was required to determine whether granting the motion is necessary to correct a manifest injustice. "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. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5. Manifest injustice " 'is an extremely high standard, which permits a defendant to withdraw his guilty plea only in extraordinary cases.' " *State v. Tabor*, 10th Dist. No. 08AP-1066, 2009-Ohio-2657, ¶ 6, quoting *State v. Price*, 4th Dist. No. 07CA47, 2008-Ohio-3583, ¶ 11.

{¶ 8} "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 (1977), paragraph one of the syllabus. A motion pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *Id*. at paragraph two of the syllabus. Thus, appellate review of the trial court's denial of a post-sentence motion to withdraw guilty plea is limited to the determination of whether the trial court abused its discretion. *State v. Conteh*, 10th Dist. No. 09AP-490, 2009-Ohio-6780, ¶ 16. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 9} " 'An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.' " *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550, ¶ 24, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus. " 'A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality.' " *State ex rel. O'Brien* at ¶ 24, quoting *State ex rel. Dickman* at 147. The party alleging a statute is unconstitutional must prove that assertion beyond a reasonable doubt in order to prevail. *State v. Anderson*, 57 Ohio St.3d 168, 171 (1991).

{¶ 10} " 'Under the vagueness doctrine, statutes which do not fairly inform a person of what is prohibited will be found unconstitutional as violative of due process.' "

State v. Carrick, 131 Ohio St.3d 340, 2012-Ohio-608, ¶ 14, quoting *State v. Reeder*, 18 Ohio St.3d 25, 26 (1985), citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926). "[A]ny statute which 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' is void for vagueness." *State v. Tanner*, 15 Ohio St.3d 1, 3 (1984), quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). Yet, " '[i]mpossible standards of specificity are not required. * * * The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' " *Reeder* at 26, quoting *Jordan v. De George*, 341 U.S. 223, 231-32 (1951).

{¶ 11} The provision at issue which appellant asserts is void for vagueness does not address the criminal offense itself, which is defined in R.C. 2907.31(A), but rather the provision in R.C. 2907.31(C)(1), which sets forth an affirmative defense. The relevant portions of the statute, entitled "Disseminating matter harmful to juveniles," reads as follows:

> (A) No person, with knowledge of its character or content, shall recklessly do any of the following:
>
> (1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;
>
> * * *
>
> (C)(1) It is an affirmative defense to a charge under this section, involving material or a performance that is obscene or harmful to juveniles, that the material or performance was furnished or presented for a bona fide medical, scientific, educational, governmental, judicial, *or other proper purpose*, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, *or other proper person*.

(Emphasis added.)

{¶ 12} In reading R.C. 2907.31 in its entirety, it is apparent that the statute identifies specific situations in which it is proper to present obscene or harmful materials to juveniles. The statute further defines the persons who may do so. However, appellant has not argued that he falls into one of these categories and, upon review of the evidence in the record, we find nothing to demonstrate he should fall into one of the specified categories or that the affirmative defense was available to him. Instead, the conduct at issue here centers around whether appellant directly delivered, furnished, disseminated, provided, exhibited, or presented to a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as a juvenile, any material or performance that is obscene and harmful to juveniles.

{¶ 13} The record indicates that appellant disseminated harmful material to a police officer posing as a 15-year-old boy, thereby demonstrating that appellant committed conduct which is clearly statutorily prohibited conduct under R.C. 2907.31(A)(1). " 'One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.' " *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), fn 7, quoting *Parker v. Levy*, 417 U.S. 733, 756 (1974). Here, the language of R.C. 2907.31(A)(1) conveys a sufficiently definite warning as to the proscribed conduct, pursuant to common understanding and practices.

{¶ 14} Furthermore, appellant is without standing to challenge the statute except as it is being applied to him. *Gandee v. Glaser*, 785 F.Supp. 684, 694 (S.D.Ohio 1992). *See also State of Ohio/City of Hamilton v. Hendrix*, 144 Ohio App.3d 328 (12th Dist.2001) (in void for vagueness challenges based on alleged due process violations, a challenger typically has standing to challenge the statute only as to its application to his conduct; a challenger must show the alleged vagueness of the statute actually deprived him of due process of law, in light of his conduct).

{¶ 15} Appellant has never made the argument that his actions constitute (or could constitute) an "other proper purpose" or that he is (or could be) an "other proper person" who would be justified in disseminating the harmful material. He has not argued that he believed his conduct was justified, only to be informed otherwise, as he has not attempted to apply the affirmative defense to his circumstances, nor has he claimed that the affirmative defense applied to him. Under the law, he may only challenge the statute as it

was and is applied to him. *See Gandee* at 694; *Hendrix*. And, as stated above, a person cannot challenge a statute for vagueness where the statute clearly applies to his conduct. *Hoffman Estates; Parker*.

{¶ 16} The underlying principle of the void-for-vagueness doctrine is that no person "shall be held criminally responsible for conduct which he could not reasonable understand to be proscribed." *Columbus v. Rogers*, 41 Ohio St.2d 161, 164 (1975), quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954). Here, appellant cannot argue that he could not reasonably understand that his conduct was proscribed. The statute clearly provides a person of ordinary intelligence with fair notice that his contemplated conduct is prohibited under the statute.

{¶ 17} Moreover, claiming that an affirmative defense which he has not attempted to assert is void for vagueness is far different from claiming that the provision of the statute setting forth the elements of the crime is so vague that he could not know that his conduct was forbidden. Any purported vagueness in the language of the affirmative defense does not deprive this challenger of due process in light of his particular conduct, and it is unnecessary for the court to determine whether the affirmative defense provision is in fact void for vagueness.

{¶ 18} Appellant further argues that similar language in R.C. 2907.323(A)(1)(a), the statute prohibiting the illegal use of minors in nudity-oriented material or performances, also addresses exemptions for materials meant for an "other proper purpose" or an "other person having a proper interest in the material or performance," and was found by the Second District Court of Appeals to be "a classic example of a statute which is void for vagueness." *State v. Robinson*, 2d Dist. No. 85 CA 47, 1986 WL 5134, *4, 1986 Ohio App. LEXIS 6671, *10 (May 1, 1986). However, based on the authority of *State v. Meadows*, 28 Ohio St.3d 43 (1986), the Supreme Court of Ohio reversed the court of appeals' determination that R.C. 2907.323 was unconstitutionally vague. *See State v. Robinson*, 28 Ohio St.3d 65 (1986). Therefore, we find appellant's reliance upon this authority to be meritless.

{¶ 19} Finally, appellant challenges the determination that his motion to withdraw guilty plea should be denied because it was untimely, arguing timeliness is not required. While conceding timeliness is a requirement in a post-conviction relief petition, appellant

contends timeliness is not required in a motion to withdraw guilty plea. However, we disagree with appellant's argument.

{¶ 20} The timeliness of appellant's post-sentence motion to withdraw guilty plea is certainly one of the factors to be considered. "An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under Crim.R. 32.1 is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Smith* at paragraph three of the syllabus; *Conteh* at ¶ 15. Unlike post-conviction petitions, which are governed by R.C. 2953.21 and 2953.23, and which set forth a specific time limit for filing (with certain exceptions), Crim.R. 32.1 itself does not prescribe a particular time limitation. *State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, ¶ 14. Nevertheless, this does not mean that timeliness is not a consideration. *Id*.

{¶ 21} Here, appellant filed his motion to withdraw guilty plea nearly ten months after he entered his guilty plea and over eight months after he was sentenced. Appellant provided no explanation as to the reason for the delay in filing his motion. It was not an abuse of discretion for the trial court to consider this factor in deciding to deny appellant's motion to withdraw guilty plea.

{¶ 22} Based upon the foregoing analysis, appellant has not demonstrated that the statute, as applied to him, is unconstitutional or that the trial court erred in considering the timeliness of the filing of the motion as a factor in its decision, and he has failed to demonstrate a manifest injustice. Accordingly, we find the trial court did not abuse its discretion in denying appellant's motion to withdraw guilty plea. Therefore, we overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.
