

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio , :
 :
 Plaintiff-Appellant, :
 :
 v. : Nos. 14AP-662
 : and 14AP-871
 Ghassan Mohammad, : (C.P.C. No. 13CR-592)
 :
 Defendant-Appellee. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on March 31, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Meeks and Thomas Co., LPA, David H. Thomas and Kathryn S. Wallrabenstein, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing the dismissal of charges against Ghassan Mohammad. Two separate appeals are pending because the trial court judge assigned to the case initially ordered that two of the three charges were to be dismissed initially and then followed that ruling with a judgment entry which dismissed the case entirely.

{¶ 2} The assignments of error set forth in the two different briefs filed by the State are:

{¶ 3} In 14AP-662:

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS WHEN THE STATUTORY SCHEME IN EXISTENCE AT THE TIME OF THE OFFENSES PROHIBITED TRAFFICKING AND POSSESSION OF SCHEDULE I SUBSTANCES THAT WERE CONTROLLED SUBSTANCE ANALOGS.

{¶ 4} In 14AP-871:

THE TRIAL COURT ERRED IN FILING THE "ENTRY TERMINATING CASE" WHEN THE COURT HAD ONLY DISMISSED TWO OF THE THREE COUNTS, WHEN THE STATE'S APPEAL THEREFROM REMAINED PENDING, AND WHEN THE THIRD CHARGE FOR TAMPERING WITH EVIDENCE REMAINED PENDING.

{¶ 5} Addressing the assigned error in 14AP-662, the trial court dismissed two charges because the trial found that the legislature had not criminalized the possession of a controlled substance analog at the time alleged in the indictment of Ghassan Mohammad. The trial court further found that subsequent amendment of the pertinent statutes and pursuit of Ghassan Mohammad was barred by the ex post facto clauses of the United States Constitution and the Ohio Constitution.

{¶ 6} The state of Ohio, as indicated by its assignment of error, argues that possession of controlled substance analogs was illegal before the Ohio Legislature passed a law in December 2012 which purported to "create" an offense of possession of a controlled substance analog.

{¶ 7} The specific substance mentioned in the indictment is a-PVP, commonly known as bath salts. The legislature made statutory changes which were effective in December 2012. However, Ghassan Mohammad apparently possessed bath salts in August 2012.

{¶ 8} The state of Ohio has consistently contended that R.C. 3719.013 made possession of bath salts and other controlled substance analogs illegal before the legislature claimed it enacted the offense. The problem for the state of Ohio is that R.C. 3719.013 was not part of the definition of a drug of abuse under Title 29 of the Ohio Revised Code, the title which defines criminal drug offenses.

{¶ 9} The legislature addressed some issues in Sub.H.B. No. 64, which was effective in October 2011, but did so in the context of Title 37. The legislature defined controlled substance analog in R.C. 3719.01(HH)(1).

{¶ 10} The legislature enacted a new R.C. 3719.013 at the same time. R.C. 3719.013 provided:

Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, 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.

{¶ 11} This presented practical problems. Bath salts which were to be used as bath salts were perfectly legal. Bath salts "intended for human consumption" were illegal to possess. The statute is silent as to the issue of intended by whom. The manufacturer? The merchant selling the bath salts? The purchaser who wants to use them in bath water? A teenage member of the purchaser's family who has heard they can be used to get high? What happens if that teenager later decides to use the bath salts in the bath water instead?

{¶ 12} Sub.H.B. No. 64 was unworkable and needed the subsequent clarifications which were effective in December 2012.

{¶ 13} A panel of this court addressed the primary issue in this case in *State v. Smith*, case No. 14AP-154 and 14AP-155, decided November 28, 2014. The panel noted that the statutory definition of controlled substance in R.C. 2925.01 did not include or expressly incorporate the definition of controlled substance analog created in Sub.H.B. No. 64 and therefore the panel found possession of controlled substance analogs had not yet been criminalized. We follow the *Smith* case today.

{¶ 14} The assignment of error in case No. 14AP-662 is overruled.

{¶ 15} The assignment of error in case No. 14AP-871 addresses the question of whether the whole case should have been dismissed, or only the counts pertaining to the possession of bath salts. Appellate counsel for Ghassan Mohammad has not separately briefed this issue. Counsel for the state of Ohio has acknowledged that the third charge, one of tampering with evidence, alleges that Ghassan Mohammad altered, destroyed, concealed or removed bath salts with a purpose to impair its value or availability as evidence in a proceeding or investigation.

{¶ 16} The merits of the dismissal of the tampering with evidence charge were not fully developed in the trial court and were not considered or addressed by the trial court. Accordingly, we sustain the assignment of error in 14AP-871.

{¶ 17} As a result, we affirm the trial court's ruling as to possession of bath salts under 14AP-662. We reverse the trial court's ruling dismissing the tampering with evidence charge as questioned in 14AP-871 and remand the case for further proceedings with respect to the tampering with evidence charge.

*Judgment affirmed in part and
reversed in part; remanded for further proceedings.*

BROWN, P.J., and SADLER, J., concur.
