

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, : No. 14AP-517
 : (C.P.C. No. 12CR-5582)
 v. :
 : (REGULAR CALENDAR)
 Soleiman Mobarak, :
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on July 28, 2015

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

The Behal Law Group LLC, *Robert J. Behal*, *John M. Gonzales*, and *Gilbert J. Gradisar*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Soleiman Mobarak, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a first-degree felony (with a specific factual finding that one or more instances of corrupt activity involved a felony of the first degree; and, separately, that one or more instances of corrupt activity involved a felony of the second or third degree); aggravated trafficking in drugs, in violation of R.C. 2925.03, a second-degree felony (with a specific factual finding that a-Pyrrolidinopentiophenone ("A-PVP") was a controlled substance analog); aggravated possession of drugs, in violation of R.C. 2925.03, a fourth-degree felony (with

a specific factual finding that A-PVP was a controlled substance analog); aggravated trafficking in drugs, in violation of R.C. 2925.03, a second-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); aggravated possession of drugs, in violation of R.C. 2925.11, a second-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); aggravated trafficking in drugs, in violation of R.C. 2925.03, a first-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); and aggravated possession of drugs, in violation of R.C. 2925.11, a first-degree felony (with a specific factual finding that A-PVP was a controlled substance analog). The jury also made findings as to the bulk amount issues on the drug counts.

{¶ 2} Appellant owns a convenience store. From March to July 2012, undercover police officers purchased packages of a substance commonly referred to as "bath salts" from appellant's store. Appellant was arrested on July 25, 2012. In August and October 2012, appellant was charged with various drug trafficking and possession counts, as well as engaging in a pattern of corrupt activity. The State of Ohio, plaintiff-appellee, alleged the bath salts were "controlled substance analogs," as defined by R.C. 3719.01(HH)(1).

{¶ 3} Appellant sought to have the charges dismissed. The trial court denied the motion orally but never filed an entry. Appellant also filed a motion in limine to exclude the testimony of the state's expert witness, arguing that he did not meet the requirements of Evid.R. 702. The trial court held a hearing and denied the motion.

{¶ 4} A jury trial commenced May 27, 2014 and concluded June 5, 2014. The trial court found appellant guilty on numerous counts, as outlined above. The trial court held a sentencing hearing June 6, 2014 and sentenced appellant to consecutive terms of incarceration totaling 35 years of mandatory confinement without parole. The trial court also fined appellant \$75,000. The trial court entered a judgment entry on June 6, 2014. Appellant appeals the judgment, asserting the following assignments of error:

I. It was plain error for the trial court to fail to dismiss all charges against Mr. Mobarak sua sponte, and allowing and his conviction [sic] and imprisonment for innocent acts is an ex post facto violation that is prohibited by the Ohio and United States Constitutions.

II. The "controlled substance analog" statute under which Mr. Mobarak was convicted was unconstitutionally vague on its

face and in its application, and his conviction was a fundamental error that violated his constitutional right to due process of law.

III. Because the state's expert testimony on the substances at issue was insufficient under both the state and federal standards, the trial court erred and abused its discretion in denying Mr. Mobarak's motion in limine to exclude this subjective evidence.

IV. The trial judge erred to Mr. Mobarak's prejudice because an order imposing consecutive sentences in this case is not supported by the facts.

{¶ 5} Appellant argues in his first assignment of error that, although he never raised any claim of error at trial, it was plain error for the trial court to fail to dismiss all charges against him sua sponte, and his conviction and imprisonment for innocent acts is an ex post facto violation that is prohibited by the Ohio and United States Constitutions. "Ordinarily, a failure to bring an error to the attention of the trial court at a time when the court could correct that error constitutes a waiver of all but plain error." *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, ¶ 22 (2d Dist.), citing *State v. Wickline*, 50 Ohio St.3d 114, 120 (1990). Plain error exists when the error is plain or obvious and when the error affects substantial rights. Crim.R. 52(B). The error affects substantial rights when, but for the error, the outcome of the proceeding would have been different. *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 57. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 78.

{¶ 6} In the present case, appellant contends that this court recently recognized in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303, that selling and possessing controlled substance analogs was not a crime until December 20, 2012, but he committed his offenses prior to that date. In *Smith*, we addressed whether Ohio law defined the possession or sale of a controlled substance analog as a criminal offense during the period from February through July 2012 when the defendant was alleged to have possessed and sold A-PVP, which is the same substance at issue in the present case. We first summarized the history of 2011 Am.Sub.H.B. No. 64 ("H.B. No. 64") and R.C. 3719.01(HH)(1). Under

H.B. No. 64, the General Assembly created a definition of "controlled substance analog" in R.C. 3719.01(HH). The legislation provided that "[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." H.B. No. 64. The amendments and new statutes enacted under H.B. No. 64 became effective October 17, 2011. The General Assembly subsequently passed additional legislation in 2012 amending many of the sections of law relevant to *Smith*, and those amendments became effective December 20, 2012. 2012 Am.Sub.H.B. No. 334. Therefore, at the time of the alleged acts giving rise to the charges in *Smith*, as well as those in the present case, the law as amended by H.B. No. 64 controlled.

{¶ 7} The issue in *Smith* was whether, at the times relative to the appeal, the law contained a positive prohibition on the possession or sale of "controlled substance analogs" and provided a penalty for violating that prohibition. We noted the following ambiguities existed in the criminal statutes: (1) by failing to incorporate the definition of "controlled substance analog" in R.C. 3719.01(HH) into R.C. 2925.01, while specifically incorporating other definitions of terms from R.C. Chapter 3719, the General Assembly excluded that definition from applying in the context of the criminal drug offense statutes; (2) R.C. 3719.01 expressly limits the definitions contained therein, including the definition of "controlled substance analog" under R.C. 3719.01(HH), to "[a]s used in this chapter"—i.e., Chapter 3719 of the Revised Code; (3) the preamble to H.B. No. 64 indicated that one of its purposes was "to define a 'controlled substance analog' for purposes of the Controlled Substances Law," suggesting that the definition created in the legislation was limited to that portion of the Revised Code and did not extend to the criminal drug offense statutes. H.B. No. 64; (4) R.C. Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement, and there were no cross-references or any other indicators in R.C. Chapter 2925 to provide notice that the treatment of controlled substance analogs under R.C. Chapter 3719 also applied to R.C. 2925; (5) R.C. 3719.01(HH)(2)(a) states that "controlled substance analog" does not include "[a] controlled substance," which seemingly contradicts R.C. 3719.013; and (6) unlike the federal Controlled Substance Analogue Enforcement Act of 1986, in which all of the relevant provisions were placed into the same portion of federal law that contained the

prohibitions on possession and sale of controlled substances, H.B. No. 64 placed the controlled substance analog provisions in R.C. Chapter 3719, separate from the prohibitions and penalties set forth in R.C. Chapter 2925, and failed to incorporate any explicit cross-references in R.C. Chapter 2925 to the controlled substance analog provisions. Applying the rule of lenity, which requires the court to construe ambiguity in criminal statutes strictly so as to apply only to conduct that is clearly proscribed, we concluded in *Smith* that, during the period from February through July 2012 when the defendant was alleged to have possessed and sold A-PVP, R.C. 2925.03 and 2925.11 did not adequately state a positive prohibition and provide a penalty for violation of such prohibition on the sale or possession of controlled substance analogs. Therefore, we found the acts defendant was alleged to have committed in *Smith* were not clearly defined as criminal offenses under the law as it existed at the time.

{¶ 8} We recently followed *Smith* in *State v. Mohammad*, 10th Dist. No. 14AP-662, 2015-Ohio-1234, which also concerned A-PVP, to conclude 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 H.B. No. 64, and, thus, possession of controlled substance analogs had not yet been criminalized by that bill.

{¶ 9} Applying *Smith* to the present case, we find possession and trafficking of controlled substance analogs had not yet been criminalized as of the time of appellant's offenses. Thus, we find the trial court here erred when it found appellant guilty of aggravated possession of drugs and aggravated trafficking in drugs, and we sustain appellant's first assignment of error. Furthermore, a conviction for engaging in a pattern of corrupt activity is dependent upon the presence of predicate offenses. *See* R.C. 2923.31(E). The predicate offenses here were the aggravated possession of drugs and aggravated trafficking in drugs counts. Given our determination with regard to the predicate offenses, we must find the trial court erred when it found appellant guilty of engaging in a pattern of corrupt activity.

{¶ 10} We also note that, after oral arguments in this matter, the state was granted leave to file a supplemental brief to address a recent United States Supreme Court case, *McFadden v. United States*, ___ U.S. ___, 135 S.Ct. 2298 (2015). The state contends that

McFadden answers the issue before us concerning the "shall be treated" language in R.C. 3719.013. However, in its supplemental brief, the state presents many of the same arguments that this court rejected in *Smith*. Furthermore, the United States Supreme Court in *McFadden* was not asked to directly interpret the "shall be treated" language in the Controlled Substance Analogue Enforcement Act of 1986. The issue before the United States Supreme Court concerned the knowledge necessary for conviction under the Controlled Substances Act ("CSA") when the controlled substance at issue is an analog. The United States Supreme Court merely assumed that the analog was included as a controlled substance for purposes of interpreting the mens rea requirement in the CSA. Therefore, we do not find that *McFadden* demands a different result in the present case. For all the foregoing reasons, appellant's first assignment of error is sustained. In addition, given our above determinations, we need not address appellant's second, third, and fourth assignments of error.

{¶ 11} Accordingly, appellant's first assignment of error is sustained, his second, third, and fourth assignments of error are rendered moot, and the judgment of the Franklin County Court of Common Pleas is reversed.

Judgment reversed.

KLATT and HORTON, JJ., concur.
