[Cite as *State v. Baker*, 2011-Ohio-3431.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-11-033
	:	O P I N I O N
- vs -		7/11/2011
	:	
DOUGLAS L. BAKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08CRI00074

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 1st Floor Courthouse, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Rion, Rion & Rion, L.P.A., Inc., Jon Paul Rion, 130 West Second Street, Suite 2150, Dayton, Ohio 45402, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Douglas L. Baker, appeals the decision of the Fayette County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea without an evidentiary hearing.

{¶2} In 2008, appellant was indicted on one count of trafficking in drugs, R.C.

2925.03(C)(4)(d), a felony of the second degree, one count of trafficking in drugs, R.C. 2925.03(C)(4)(c), a felony of the third degree, one count of possession of drug paraphernalia, R.C. 2925.14(C)(1), a misdemeanor of the fourth degree, and one count of possession of drugs, R.C. 2925.11(C)(3)(a), a minor misdemeanor.

{¶3} On September 29, 2008, appellant plead guilty to the offenses as charged and was subsequently sentenced to five years in prison. On August 25, 2010, appellant moved to withdraw his guilty plea pursuant to Crim.R. 32.1 on the grounds that his plea was not made knowingly because he was unaware he had a "complete defense" to the charges prior to entering his plea. In support of his motion, appellant submitted an affidavit asserting "the drugs involved in my case weighed less than I was convicted for, and I was not advised I could have the drugs weighed independently[.]"

{¶4} On November 4, 2010, the trial court denied appellant's motion without an evidentiary hearing. In doing so, the trial court found appellant entered into a jointly recommended plea and sentence and explained that while appellant was entitled to an independent analysis of the drugs, he was not entitled to an independent weighing thereof. See R.C. 2925.51(E). Additionally, the trial court held that the weight of the drugs possessed was not a complete defense to drug trafficking charges.

{¶5} Appellant timely appeals, raising one assignment of error for review:

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VACATE HIS PLEA BECAUSE APPELLANT HAD A COMPLETE DEFENSE TO THE CHARGE[.]"

{¶7} In his sole assignment of error, appellant asserts several arguments relating to his motion to withdraw his guilty plea. We will address each argument in turn.

{¶8} Pursuant to Crim.R. 32.1, "[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. Degaro*, Butler App. No. CA2008-09-227, 2009-Ohio-2966, ¶10, quoting *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. In general, manifest injustice "relates to a fundamental flaw in the proceedings that results in a miscarriage of justice or is inconsistent with the requirements of due process." *State v. Johnson*, Butler App. Nos. CA2010-12-327, CA2011-02-019, 2011-Ohio-3015, ¶9. "A post-sentence motion to withdraw a guilty plea is allowable only in extraordinary cases, and therefore, because the decision to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court, an appellate court will not reverse a trial court's decision absent an abuse thereof." Id.

{¶9} First, appellant argues that prior to entering his guilty plea, he lacked information regarding the weight of the drugs he allegedly possessed, but that upon learning this information, he "realized he may have [had] a complete defense * * * as he did not possess the amount of drugs as charged." Appellant argues that an "independent weighing" of the drugs would have proved he possessed a lesser quantity of drugs than the indictment alleged.

{¶10} As previously noted, the trial court held "weight is not a complete defense to a drug trafficking charge. [Appellant] did have a statutory right to an independent *analysis* of the drugs but not an independent weighing of the narcotics." (Emphasis sic.) We agree with the trial court.

{¶11} In Ohio, a complete defense exists if "the evidence adduced on behalf of the defense is such that if accepted by the trier of the facts it would constitute a complete defense to *all* substantive elements of the crime charged." *State v. Nolton* (1969), 19 Ohio St.2d 133. (Emphasis added.) Relevant case law further indicates a complete defense absolves all criminal responsibility, whereas a "partial" or "imperfect" defense simply reduces the crime charged. See *Nolton*. See, also, *McNeil v. United States*

(App.D.C.2007), 933 A.2d 354, 365 (distinguishing between defenses that absolve criminal responsibility versus defenses that reduce the crime charged, but criminal responsibility "never ceases"); *Lee v. State* (2010), 193 Md.App. 45, 996 A.2d 425 ("complete defense" entitles defendant to acquittal, whereas "partial" or "imperfect" defense reduces level of crime charged); *State v. Adin* (Mar.1876), 7 Ohio Dec.Reprint 25, 1876 WL 6059; *People v. Moye* (2009), 47 Cal.4th 537, 98 Cal.Rptr.3d 113, 213 P.3d 652.

{¶12} In the case at bar, the thrust of appellant's argument is that the drugs weighed less than the amount alleged in the indictment. Appellant also argues he was entitled to an "independent weighing" of the drugs to prove his claim. However, while a person accused of violating R.C. Chapter 2925 is entitled to an independent *analysis* of the drugs, he is not entitled to an independent weighing thereof. See R.C. 2925.51(E). At no time did appellant request an independent analysis of the drugs or claim they were a substance other than crack cocaine. Thus, appellant failed to assert a right to which he was entitled under R.C. 2925.51.

{¶13} Even if this court were to accept appellant's argument, his defense would constitute a "partial" or "imperfect" defense. More specifically, appellant's evidence, if believed, would negate only *one* substantive element of the drug trafficking charges, namely, the specific weight of the drugs appellant possessed. Cf. *Nolton*, 19 Ohio St.2d at 133. Appellant presented no evidence pertaining to the remaining substantive elements of drug trafficking. R.C. 2925.03(C)(4)(c), (d). As such, appellant's defense cannot be a complete defense because it would not absolve appellant of all criminal responsibility or excuse his crimes. Instead, the result would be to reduce the grade or degree of the crimes charged. *Nolton*; *McNeil*, 933 A.2d at 365.

{¶14} Accordingly, we reject appellant's first argument.

{¶15} Second, appellant argues he was entitled to an evidentiary hearing on his motion because the facts in his affidavit, if believed, would have warranted the withdrawal of his guilty plea.

{¶16} In the case at bar, the only evidence appellant offered to prove he was unaware of the amount of drugs he allegedly possessed was his own affidavit. Ohio courts have consistently upheld a trial court's decision to discount a defendant's self-serving affidavit as a true statement of fact where such statements were far from disinterested. See *State v. Williams*, Warren App. No. CA2009-03-032, 2009-Ohio-6240, ¶17 ("a trial court may, in the exercise of its discretion, judge the credibility of affidavits submitted in support of a motion to withdraw a plea in determining whether to accept the affidavits as true statements of fact"); *State v. Yearby* (Jan. 24, 2002), Cuyahoga App. No. 79000, 2002 WL 120530, at *2-3.

{¶17} Contrary to appellant's claim, our review of the record reveals the state submitted several documents during discovery indicating the approximate weight of the drugs in appellant's possession. First, the state submitted a "narrative supplement" from Detective Doug Coe of the Fayette County Sheriff's Office, explaining a "field test" performed on "off white rocks" in appellant's home indicated the rocks weighed 5.5 grams. During continued discovery, the state also submitted a laboratory report from the Bureau of Criminal Identification and Investigation ("BCI report"), indicating the same "off-white solid substance * * * found to contain [crack] cocaine" weighed exactly 5.9 grams.

{¶18} Under these circumstances, we find appellant had sufficient notice that the drugs alleged in the indictment weighed *at least* 5.5 grams and, absent additional evidence to the contrary, appellant cannot now claim ignorance of information so clearly provided in the record. See, e.g., *State v. Richey*, Sandusky App. No. S-09-028, 2011-Ohio-280, ¶63 ("bold assertions without evidentiary support simply should not merit the

type of scrutiny that substantiated allegations would merit"); *State v. Davison*, Stark App. No. 2008-CA-00082, 2008-Ohio-7037, ¶50 (the accused must factually substantiate his or her claim of innocence or a meritorious defense); *State v. Gallagher*, Mahoning App. No. 08 MA 178, 2009-Ohio-2636, ¶38.

{¶19} Accordingly, we reject appellant's second argument because he failed to show a manifest injustice warranting the withdrawal of his guilty plea or that the trial court erred in denying the motion without an evidentiary hearing. See *State v. Powell*, Clermont App. No. CA2009-05-028, 2009-Ohio-6552; *State v. Eberle*, Clermont App. No. CA2009-10-065, 2010-Ohio-3563, ¶59 (a trial court "need not hold an evidentiary hearing on a post-sentence motion to withdraw where the record indicates the defendant is not entitled to relief").

{¶20} Third, appellant argues he did not waive the right to challenge defects in the indictment regarding the identity and quantity of the drugs he allegedly possessed. We disagree.

{¶21} Where a defendant fails to object to the sufficiency of the indictment prior to trial as required by Crim.R. 12(C), he waives all but plain error. *State v. Wagers*, Preble App. No. CA2009-06-018, 2010-Ohio-2311, ¶7; *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶7. Notice of plain error must be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95. An error does not rise to the level of plain error unless, but for the error, the outcome of the trial would have been different. Id. at 96-97.

{¶22} In the case at bar, appellant relies on *State v. Yslas*, Miami App. No. 05CA43, 2007-Ohio-5646, for the proposition that the "misidentification of the identity and quantity of the drugs in this case constitute[d] plain error." Appellant's reliance on *Yslas* is

misplaced. In *Yslas*, defendant was arrested for possession of powder cocaine, but was charged with possession of crack cocaine in an amount greater than that which is prohibited under R.C. 2925.11(C)(4)(b).[1] The Second District Court of Appeals found plain error existed because defendant entered a plea to a statutory offense that did not exist under R.C. 2925.11(C)(4)(b).

{¶23} In the case at bar, the indictment accurately charged appellant with possession of crack cocaine in amounts consistent with charges under R.C. 2925.03(C)(4)(c) and (d). Thus, unlike *Yslas*, the charges to which appellant pled constituted valid statutory offenses. Moreover, appellant suffered no prejudice resulting from the indictment language where, as previously discussed, appellant received information sufficient to notify him of the alleged weight of the drugs prior to entering his plea. Accordingly, we find appellant waived any error pertaining to the indictment.

{¶24} In sum, because appellant failed to demonstrate a manifest injustice warranting the withdrawal of his guilty plea, we find the trial court did not abuse its discretion by failing to conduct a hearing on appellant's motion or by denying the same.

{¶25} The assignment of error is overruled.

{¶26} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

1. Specifically, defendant was charged with possession of crack cocaine weighing *more* than five grams. However, R.C. 2925.11(C)(4)(b) only applies to possession of crack cocaine in an amount that "equals or exceeds one gram but is *less* than five grams of crack cocaine[.]" (Emphasis added.)