

[Cite as *State v. Montgomery*, 2010-Ohio-6568.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WINDELL E. MONTGOMERY

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Patricia A. Delaney, J.

Case No. 10-CA-75

OPINION

CHARACTER OF PROCEEDING:

Licking County Court of Common Pleas,
Case No. 10 CR 191

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

December 30, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

BRIAN T. WALTZ
Assistant Prosecuting Attorney
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Hoffman, P.J.

{¶1} Defendant-appellant Windell E. Montgomery appeals his conviction and sentence entered by the Licking County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 7, 2010, Appellant agreed to sell half an ounce of methamphetamine to a confidential informant. Prior to the sale, Appellant was stopped and arrested. Pursuant to a search incident to the arrest, the police found Appellant in possession of 21.21 grams of methamphetamine. Appellant later admitted to the investigating officers his purpose was to sell the drugs.

{¶3} Appellant entered pleas of guilty to one count of aggravated trafficking in drugs (methamphetamine), in violation of R.C. 2925.03(A)(1) and/or (2)(C)(1)(d); one count of aggravated possession of drugs (methamphetamine), in violation of R.C. 2925.11(A)(C)(a)(c); and to a forfeiture specification involving monies and a motor vehicle pursuant to R.C. 2941.1417 and R.C. 2981.02.

{¶4} Via Judgment Entry of July 1, 2010, the trial court sentenced Appellant to four years on each count, to run consecutively. The vehicle and monies were ordered forfeited.

{¶5} Appellant now appeals, assigning as error:

{¶6} "I. THE TRIAL COURT COMMITTED PLAIN ERROR IN CONVICTING APPELLANT ON COUNT I AND/OR IN ITS SENTENCE."

{¶17} Appellant asserts the indictment was defective as to Count I, as the indictment failed to include the culpable mental state of “knowingly,” as required by R.C. 2925.03(A)(2).

{¶18} In *State v. Horner*, 2010-Ohio-3830, the Ohio Supreme Court held:

{¶19} “Further, we hold that failure to timely object to a defect in an indictment constitutes a waiver of the error. Crim.R. 12(C)(2) (objections to defect in indictment must be raised before trial). Any claim of error in the indictment in such a case is limited to a plain-error review on appeal. *State v. Frazier* (1995), 73 Ohio St.3d 323, 652 N.E.2d 1000; Crim.R. 52(B).”

{¶10} As Appellant did not raise the issue before the trial court, we find all but plain error relative to the alleged defective indictment is waived.

{¶11} The record indicates Appellant was charged in the alternative as he both offered to sell drugs to the confidential informant and transported them with intent to sell. The indictment alleges, in part, Appellant “did knowingly [offer to sell] and/or did prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute” the drugs involved. We conclude the use of knowingly at the beginning of the indictment applies to both subsections. Furthermore, we note a conviction under either subsection would be sufficient as they were charged in the alternative. Given Appellant’s guilty plea, we find Appellant has not demonstrated plain error.

{¶12} Appellant also argues Counts 1 and 2 should have been merged for sentencing purposes as they are allied offenses of similar import. Appellant maintains trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of the same controlled substance under R.C. 2925.11(A) are allied offenses of similar import

under R.C. 2941.25(A), and pursuant to the authority of *State v. Cabrales* 2008-Ohio-1625, because commission of the first offense necessarily resulted in commission of the second.

{¶13} However, in *Cabrales*, supra, the Ohio Supreme Court held the offense of possessing a controlled substance, committed by knowingly obtaining, possessing, or using a controlled substance, and the offense of trafficking in a controlled substance, committed by knowingly selling or offering to sell a controlled substance, are not allied offenses of similar import, and thus merger of the offenses for sentencing purposes is not required. The Supreme Court held a trafficking offense requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it, while a possession offense does not require an intent to sell. R.C. 2925.03(A)(1), 2925.11(A), 2941.25(A). Accordingly, Appellant's argument is overruled.

{¶14} Appellant's convictions and sentence in the Licking County Court of Common Pleas are affirmed.

By: Hoffman, P.J.

Farmer, J. and

Delaney, J. concur

s/ William B. Hoffman

HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer

HON. SHEILA G. FARMER

s/ Patricia A. Delaney

HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

WINDELL E. MONTGOMERY

Defendant-Appellant

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JUDGMENT ENTRY

Case No. 10-CA-75

For the reasons stated in our accompanying Opinion, Appellant’s convictions and sentence entered by the Licking County Court of Common Pleas are affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY