

[Cite as *State v. Smith*, 2020-Ohio-5241.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MONTE SMITH

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P. J.

Hon. John W. Wise, J.

Hon. Earle E. Wise, Jr., J.

Case No. CT2020-0022

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. CR2018-0507

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 6, 2020

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

D. MICHAEL HADDOX
PROSECUTING ATTORNEY
GERALD V. ANDERSON, II
ASSISTANT PROSECUTOR
27 North Fifth Street, P.O. Box 189
Zanesville, Ohio 43702-0189

TODD W. BARSTOW
261 West Johnstown Road
Suite 204
Columbus, Ohio 43230

Wise, John, J.

{¶1} Defendant-Appellant Monte E. Smith appeals his conviction and sentence entered in the Muskingum County Court of Common Pleas on two counts of Trafficking in Drugs and one count of Possession of Drugs, following a plea of guilty.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} The relevant facts and procedural history are as follows:

{¶4} In March of 2018, detectives with the Central Ohio Drug Enforcement Traffic Force ("CODE") began investigating drug trafficking activities of Appellant Monte Smith. (Plea T. at 16). CODE had received information from a confidential informant that Appellant was willing to sell large quantities of methamphetamine to the confidential informant. *Id.*

{¶5} Between April 4 and May 25, 2018, in Muskingum County, CODE made a series of controlled buys of methamphetamine and marijuana from Appellant. *Id.* Those controlled purchases were video and audio recorded.

{¶6} On August 7, 2018, CODE detectives executed a search warrant related to these drug transactions. *Id.* at 18. They recovered \$9,000.00 in U.S. currency wrapped in rubber bands consistent with drug trafficking, and a plastic container containing a little less than two pounds of marijuana, which was related to this investigation due to a continuing course of conduct. *Id.*

{¶7} Appellant was subsequently arrested.

{¶8} As a result, the Muskingum County Grand Jury indicted Appellant Monte Smith on August 15, 2018, on two counts of Trafficking in Drugs, both felonies of the first

degree, with Major Drug Offender specifications; one count of Possession of Drugs, a felony of the third degree, with a Forfeiture Specification; and two counts of Permitting Drug Abuse, both felonies of the fifth degree.

{¶19} The case was set for trial on October 16, 2018, and was continued at defense request to November 5, 2018.

{¶10} On November 1, 2018, the State of Ohio accessed and began downloading Appellant's recorded jail phone calls. A disc containing those phone calls was created and provided as a supplemental discovery item to defense counsel the following day. As the prosecutor's office investigator processed the jail calls, a summary of those calls was provided to defense counsel.

{¶11} On November 5, 2018, after his trial started, Appellant entered a plea of no contest to the following amended charges: Count I, Trafficking in Drugs (Methamphetamine), pursuant to R.C. §2925.03(A)(1), a felony of the third degree; Count III, Trafficking in Drugs (Methamphetamine), pursuant to R.C. §2925.03(A)(1), with a major drug offender specification, pursuant to R.C. §2941.1410, a felony of the first degree; and Count V, Possession of Drugs (Marijuana), pursuant to R.C. §2925.11(A), with a forfeiture specification, a felony of the fifth degree. All other counts and specifications were dismissed pursuant the agreement of the parties.

{¶12} A joint recommendation of fifteen (15) years was reached between the parties. Appellant further agreed to forfeit the 9,000.00 dollars of U.S. currency seized in the matter. The trial court accepted Appellant's no contest pleas and found him guilty of the charges. Appellant further negotiated to be released on bond for over a month to get

his affairs in order and to see his family prior to serving his sentence. This was agreeable to the State due to Appellant's potential law enforcement usefulness during that time.

{¶13} Sentencing was deferred, and a pre-sentence investigation was ordered.

{¶14} On December 28, 2018, a sentencing hearing was held. The trial court followed the joint recommendation of the parties. Appellant was sentenced to a stated prison term of thirty-six (36) months and a mandatory fine of \$5,000 for count one, a mandatory prison term of eleven (11) years and a mandatory fine of \$10,000 for count three, and a stated prison term of twelve (12) months for count five, to be served consecutively for an aggregate prison term of fifteen (15) years.

{¶15} Appellant appealed from the trial court's Entry dated January 2, 2019, raising five assignments of error.

{¶16} On November 7, 2019, this Court rendered its opinion finding that the trial court had failed to inform Appellant of the effect of his no contest plea. The matter was reversed and remanded back to the trial court for further proceedings. See *State v. Smith*, 5th Dist. Muskingum App. No. CT2019-0005, 2019-Ohio-4645.

{¶17} On February 25, 2020, following remand, new trial counsel filed a motion to suppress. The basis of that motion was a search warrant which permitted the installation of a tracking device on a motor vehicle operated, but not owned, by Appellant.

{¶18} Also, on February 25, 2020, trial counsel also filed a motion to dismiss the Possession count due to improper venue in Muskingum County, arguing the marijuana and currency associated with that count were located in Licking County.

{¶19} On March 6, 2020, the trial court held a hearing on those motions.

{¶20} By Judgment Entry filed March 20, 2020, the trial court overruled both motions.

{¶21} On March 10, 2020, Appellant appeared in court with counsel and entered guilty pleas to one count of Trafficking in Drugs (Methamphetamine), a first degree felony, with an Major Drug Offender specification; one count of Trafficking in Drugs (Methamphetamine), a first degree felony; and one count of Possession of Drugs (Marijuana), a fifth degree felony, with the forfeiture specification. The plea deal was conditioned on a plea of guilty.

{¶22} On March 23, 2020, the trial court held a sentencing hearing wherein the trial court sentenced Appellant to four (4) years incarceration on the third-degree Trafficking charge and eleven (11) years on the first-degree Trafficking charge, with both of those sentences being mandatory incarceration. The trial court also imposed a sentence of one (1) year on the Possession count. The trial court ordered the Trafficking counts to be served consecutively, for a total sentence of 15 years. The trial court did not impose any fines but did order forfeiture of certain currency as to the Possession count. All other charges and specifications were dismissed pursuant to the parties' negotiated plea agreement.

{¶23} Appellant now appeals, raising the following assignment of error for review:

ASSIGNMENT OF ERROR

{¶24} "I. APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE, THEREBY DENYING HIM THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

I.

{¶25} In his sole assignment of error, Appellant argues he was denied the effective assistance of counsel. We disagree.

{¶26} More specifically, Appellant asserts trial counsel was ineffective for failing to advise him that a no-contest plea, as opposed to a guilty plea, would have preserved his right to contest the denial of his motion to suppress.

{¶27} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). These cases require a two-pronged analysis: First, we must determine whether counsel's assistance was ineffective; whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.* Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675, 693 N.E.2d 267 (1998).

{¶28} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697.

{¶29} Upon review of the record, including the transcript of the hearing on the motion to suppress, we find Appellant has not affirmatively demonstrated he would have been successful in an appeal from the trial court's denial of his motion to suppress. Accordingly, we find Appellant was not prejudiced by the failure of trial counsel to advise him to enter a no contest plea. See *State v. Gardner*, 5th Dist. Richland No. 12CA88, 2013-Ohio-2269.

{¶30} Appellant's sole assignment of error is overruled.

{¶31} Accordingly, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, John, J.

Gwin, P. J., and

Wise, Earle, J., concur.

JWW/kw