[Cite as *State v. Jackson*, 2023-Ohio-3895.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. 22CA8
v.	:	
TYSHAWN JACKSON,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Christopher Pagan, Middletown, Ohio, for appellant[1].

Jason Holdren, Gallia County Prosecuting Attorney, Gallipolis, Ohio, and William L. Archer, Special Gallia County Prosecuting Attorney, Circleville, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:10-13-23
ABELE, J.

{¶1} This is an appeal from a Gallia County Common Pleas Court judgment of conviction and sentence. Tyshawn Jackson, defendant below and appellant herein, assigns four errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT LACKED JURISDICTION OVER COUNTS 1 AND 2."

SECOND ASSIGNMENT OF ERROR:

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[1] Different counsel represented appellant during the trial court proceedings.

"JACKSON'S CONVICTION WAS UNCONSTITUTIONAL BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE [IAC] AT THE PLEA HEARING."

THIRD ASSIGNMENT OF ERROR:

"JACKSON'S CONVICTION WAS UNCONSTITUTIONAL UNDER DUE PROCESS BECAUSE HIS PLEA WAS NOT KNOWING, INTELLIGENT, OR VOLUNTARY."

FOURTH ASSIGNMENT OF ERROR:

"IT IS UNLAWFUL TO DENY APPELLATE COUNSEL A COPY OF JACKSON'S PSI TO INVESTIGATE, RESEARCH, AND PRESENT ISSUES FOR APPEAL."

{¶2} On March 9, 2021, law enforcement officers stopped a vehicle for speeding and a lane violation. During the course of the traffic stop, officers recovered suspected narcotics and arrested appellant.

{¶3} On April 14, 2021, a Gallia County Grand Jury returned an indictment that charged appellant with (1) Count 1- aggravated possession of drugs in violation of R.C. 2925.11(A), a second-degree felony, (2) Count 2- aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2), a second-degree felony, (3) Count 3- possession of a fentanyl-related compound in violation of R.C. 2925.11(A), a first-degree felony, (4) Count 4- trafficking of a fentanyl-related compound in violation of R.C. 2925.03(A)(2), a first-degree felony, and (5) Count 5- tampering with evidence in

violation of R.C. 2921.12(A)(1), a third-degree felony. Appellant pleaded not guilty to all charges.

{¶4} At the motion to suppress evidence hearing, the evidence reveals that on March 9, 2021, Ohio State Highway Patrol Trooper Drew Kuehne stopped a vehicle for speeding and a lane violation. The driver and appellant, a passenger, told the officer they had rented the car, but could not produce a rental agreement. Kuehne testified that both men appeared to be "excessively nervous," with appellant perspiring, hands shaking, breathing heavily, and blinking excessively. Because the driver had no valid driver's license, and appellant's license had been suspended, the driver attempted to make arrangements for someone to come to the scene to operate the vehicle.

{¶5} During this time, however, a narcotics canine gave a positive identification on the vehicle and officers found marijuana in the console and a bag of Chipotle food on the passenger seat floor near appellant's feet. The officers noticed that "a bag of white powder had been torn and dumped onto all the food that was in that, there was a burrito bowl underneath that bag, all the white powder had been spilled onto that burrito bowl." Officers initially believed the powder to be cocaine, but noted it could also be fentanyl or heroin. The crime lab director advised

officers to separate and collect the powder from the food, but it had already dissolved into the food. Although the driver claimed ownership of the drugs, officers became suspicious because of the bag's location under appellant's feet and appellant's "little powder mark on the side of his pants leg." Officers also played the cruiser's audio when appellant and his co-defendant revealed that both individuals had knowledge of the drugs in the Chipotle bag and discussed who would claim possession of the drugs. Subsequently, the laboratory results revealed the substance to be Chloro-3-PCP, with fentanyl also present. After hearing the evidence, the trial court overruled the motion.

{¶6} On March 2, 2022, appellant entered a guilty plea to (1) Amended Count 1 (combined) complicity to aggravated possession of drugs in violation of R.C. 2923.03(A)(2) and R.C. 2925.11(A), and (2) Count 5 tampering with evidence in violation of R.C. 2921.12(A)(1). Both offenses are third-degree felonies. The parties agreed to dismiss Counts 3 and 4. At the plea hearing, the trial court advised appellant of the charges, his constitutional rights, the possible sentence, post-release control, mandatory fine, and other consequences. Appellant acknowledged his current felony probation in Hamilton County, and further acknowledged that his guilty plea could cause Hamilton County to revoke his probation

and require him to serve a prison term. When asked if he was "comfortable going ahead and entering the guilty plea knowing that," appellant said, "yes." When asked if he had other pending felonies, appellant replied that he had felonies pending in Hamilton County. Appellant also indicated that he had spoken with counsel, who answered all his questions and explored all possible defenses. Appellant further acknowledged that the lab results revealed "it was 340 PCP, which is a * * * controlled substance analog to PCP."

{¶7} The parties' plea agreement reflects that the maximum prison term for each count is 9, 12, 18, 24, 30, or 36 months, with a maximum $10,000 fine for Amended Count 1 (½ mandatory minimum) and a license suspension up to 5 years. The trial court noted that a prison term is presumed necessary for Amended Count 1 and, even if consecutive sentences are not mandatory, the court may impose consecutive sentences. The court also advised appellant of post-release control obligations and consequences. The court indicated that the "joint/agreed recommendation will be that the Defendant be sentenced to 24 months community control with a stacked maximum underlying prison term reserved for any violation." Appellant also agreed to pay costs and a mandatory $3,000 fine.

{¶8} At the April 19, 2022 sentencing hearing, trial counsel

informed the trial court that the state's presentence investigation report (PSI) alerted him to the existence of a new indictment. Counsel stated that he believed the indictment would "significantly impact Mr. Jackson's case here," so he requested a continuance. The trial court continued sentencing until May 4, 2022.

{¶9} On May 2, 2022, appellant requested the trial court to allow him to withdraw his guilty plea. Counsel noted that, after appellant entered his guilty plea, he had been charged with new felonies in an unrelated case. The motion stated that appellant believed he "will be exonerated of the new charges at trial, but believes that the pending charges will impact his sentencing in the case at issue." The state opposed the motion.

{¶10} At the May 4, 2022 hearing, the trial court analyzed the factors in *State v. Sarver*, 4th Dist. Washington Nos. 17CA27, 17CA28, 17CA29, 2018-Ohio-2796, and concluded that (1) highly competent counsel represented appellant, (2) the trial court afforded appellant a full Crim.R. 11 hearing before he entered his plea, (3) the court afforded appellant a full hearing on his motion to withdraw his plea, (4) the court heard all of the testimony and evidence and considered the law, (5) appellant filed his motion within a reasonable time, (6) appellant's motion gave specific reasons for the withdrawal, (7) appellant understood the charges

against him, possible penalties and consequences, (8) appellant did not allege that he is not guilty, and (9) to allow appellant to withdraw his plea would prejudice the state. In particular, the court observed that the basis for appellant's motion is that the day after he entered his plea, he had additional "law enforcement contact" in another county that resulted in several first and second-degree felony drug charges. The court stated in its May 10, 2022 entry:

> The Court notes that the implication is that the Court would assume that the Defendant is guilty of those offenses charged the day after his plea was entered. The Court specifically is NOT assuming that the Defendant is guilty of those charges. As it stands now, Defendant is innocent of those charges.
>
> The court notes that, as a result of those charges, Defendant was placed on electronically monitored house arrest in the county in which the charges were filed. The Court also notes that Defendant did not report this law enforcement contact or that he was placed on EMHA to pretrial services in this court.
>
> The new charges have nothing to do with the charges to which the Defendant has pled here. The new charges are relevant to sentencing in this court because the failure to report that law enforcement contact to pretrial services constitutes a violation of bond.
>
> In the pretrial release order of April 20, 2021, Defendant was informed that he must report any law enforcement contact to pretrial services no later than twenty-four hours after the occurrence. Further, in the guilty plea document which the Defendant and his attorney read together word-for-word, and in the plea colloquy the Court had with the Defendant, he was notified that a violation of bond

> could be seen as a violation of guilty plea contract with the State. At least twice in the plea colloquy, the Court made clear with the Defendant and the Defendant acknowledged that he understood that sentencing is always the responsibility of the Court and that the Court was not bound by the agreement he made with the state.

Consequently, the trial court found no reasonable or legitimate basis to grant appellant's request to withdraw his guilty plea and the court denied appellant's motion.

{¶11} On May 5, 2022, appellant also filed a motion for a continuance and claimed that on May 4, 2022 appellant tested positive for COVID-19, with a confirmed second positive result on May 5, 2022. Appellant also submitted some type of hospital medical documentation of the test results. However, the court overruled the motion to continue and stated that the court:

> heard testimony that the Defendant's medical documentation of claimed health condition appears to be suspect. Testimony by a probation officer showed the documentation could not be verified with the emergency room. Therefore, the Court finds probable cause to believe the Defendant failed to appear for sentencing. Therefore, it is ORDERED that a warrant be issued for failure to appear.

{¶12} At appellant's June 8, 2022 sentencing hearing, the trial court made consecutive sentencing findings on the record. The trial court's June 16, 2022 sentencing entry provides that appellant had previously pleaded guilty to (1) Amended Count- One

Complicity to Aggravated Possession of Drugs, a violation of R.C. 2923.02(A)(2) and 2925.11(A), a third-degree felony, and (2) Count Five- Tampering with Evidence, in violation of R.C. 2921.12(A)(1), a third-degree felony. The court found that, pursuant to R.C. 2929.12(D): (1) appellant had been released on bond in Hamilton County at the time of the offense, (2) appellant violated his bond with new charges on August 16, 2021 (Jackson County), August 20, 2021 (Hamilton County), and March 3, 2022 (Hamilton County) without reporting the same to pretrial services, (3) the March 3, 2022 charge occurred one day after appellant entered his guilty plea in this case, (4) appellant has an extensive history of criminal convictions, having served two prior prison terms, (5) appellant did not respond favorably to sanctions previously imposed, and (6) appellant had two pending probation violations in Hamilton County.

{¶13} On June 16, 2022, the trial court sentenced appellant to (1) serve a 30-month prison term on Amended Count One (Complicity to Aggravated Possession of Drugs - 3- Choloro PCP), a violation of R.C. 2923.02(A)(2) and 2925.11(A), a third-degree felony, (2) serve a 30-month prison term on Count Five (Tampering with Evidence) in violation of R.C. 2921.12(A)(1), a third-degree felony, (3) serve up to a two-year post-release control term, and (4) pay a mandatory $3,000 fine. The court further ordered the sentences to be served

consecutively to each other for a stated term of 60 months. The court also made the consecutive sentencing findings that the sentences are necessary to protect the public from future crime and to punish the offender, are not disproportionate to the seriousness of the offender's conduct, nor disproportionate to the danger the offender poses to the public. Further, the court noted that (1) appellant committed these offenses while released on bond in Hamilton County, and (2) appellant's history of criminal conduct demonstrates the necessity of consecutive sentences to protect the public from future crime. This appeal followed.

I.

{¶14} In his first assignment of error, appellant asserts that the trial court lacked subject matter jurisdiction over Counts 1 and 2 because neither count stated an offense. The original indictment provided:

> Count One: Aggravated Possession of Drugs
>
> Knowingly obtain, possess, or use a controlled substance or a controlled substance analog when the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II when the amount of the drugs equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, to wit: 3-Chloro-PCP, in violation of Section 2925.11(A) and 2925.11(C)(1)(c) of the Ohio Revised Code.
>
> A felony of the Second Degree.

> Count Two: Aggravated Trafficking in Drugs
> Knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender had reasonable cause to believe that the controlled substance or a controlled substance analog was intended for sale or resale by the offender or another person, when the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II in an amount that equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, to wit: 3-Chloro-PCP, in violation of Section 2925.03(A)(2) and 2925.03(C)(1)(d) of the Ohio Revised Code.
>
> A Felony of the Second Degree.

{¶15} Appellant contends that the original indictment stated "non-offenses" for Counts 1 and 2. In appellant's view, because both counts alleged that 3-Chloro-PCP is a Schedule I or II substance and both counts alleged that appellant possessed and trafficked 3-Chloro-PCP from 5 to 50 times the bulk amount, these are actually non-offenses because 3-Chloro-PCP is not scheduled and, thus, does not have a bulk amount. R.C. 3719.01(C); O.A.C. Section 4729:9-1-01 and -02; Ohio Pharmacy Board, *Drug Laws of Ohio* (2020 Ed.). Therefore, possessing 3-Chloro-PCP could *never* violate R.C. 2925.11(C)(1)(c), as stated in Count 1, because it is not a scheduled drug with a bulk amount. Further, appellant argues that trafficking 3-Chloro-PCP could *never* violate R.C. 2925.03(C)(1)(d), as stated in Count 2, because it is not a scheduled drug with a

bulk amount.

{¶16} At the March 1, 2022 plea hearing, the state amended the indictment to provide: Count 1- Complicity to Aggravated Possession of Drugs in violation of R.C. 2923.03(A)(2)/2925.11(A), a third-degree felony, and Count 5- Tampering with Evidence in violation of R.C. 2921.12(A)(1), a third-degree felony. The state dismissed all other charges. Appellant contends, however, that the amendment is improper for two reasons: (1) Counts 1 and 2 were "nullities from the beginning - leaving nothing to amend," and (2) because appellant had a right to prosecution by grand-jury presentment, the indictment that found probable cause that appellant possessed 3-Chloro-PCP as a scheduled drug over bulk amounts, but did not consider whether he possessed 3-Chloro-PCP as a controlled-substance analog measured by grams, the amendment is invalid twice over and failed to cure the jurisdictional flaw.

{¶17} Appellee responds, however, that the trial court did have jurisdiction over Counts 1 and 2 of the indictment. First, R.C. 2925.11(A) sets forth the crime of illegal possession of drugs: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." R.C. 2925.03(A)(2) sets forth the crime of trafficking in illegal substances:

> No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or

> distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or controlled substance analog is intended for sale or resale by the offender or another person.

Appellee contends that the indictment tracks the language of the respective code sections. Further, appellee notes that R.C. 2925.11 and R.C. 2925.03 include controlled substance analogs, as defined by R.C. 3719.01(Z)(1):

> (1) Controlled substance analog means, except as provided in division (Z)(2) of this section, a substance to which both of the following apply:
>
> (a) The chemical structure of the substance is substantially similar to the structure of a controlled substance in schedule I or II.
>
> (b) One of the following applies regarding the substance:
>
> (I) The substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
>
> (ii) With respect to a particular person, that person represents or intends the substance to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
>
> (2) "Controlled substance analog" does not include any of the following:
>
> (a) A controlled substance;

> (b) Any substance for which there is an approved new drug application;
>
> (c) With respect to a particular person, any substance if an exemption is in effect for investigational use for that person pursuant to federal law to the extent that conduct with respect to that substance is pursuant to that exemption;
>
> (d) Any substance to the extent it is not intended for human consumption before the exemption described in division (H)(H)(2)(b) of this section takes effect with respect to that substance.

Appellee points out that the lab concluded that the substance in the Chipotle bag, and partially recovered in the plastic bag, is 3-Chloro-PCP and fentanyl, and 3-Chloro-PCP is "structurally similar to Phencyclidine (PCP), a Schedule II Substance" and mirrors the definition of a controlled substance analog because 3-Chloro-PCP is structurally similar to PCP, a Schedule II substance. Thus, both the controlled substance and the analog are covered in the possession and trafficking statutes in Chapter 2925.

{¶18} Initially, we point out that appellant did not object to the indictment's amendment. Generally, a defendant waives any challenge to an indictment when he is in the courtroom, does not object to the amendment, and indicates to the court that he understood the proceedings. *Tolbert* at ¶ 16, citing *State v. Baxter*, 8th Dist. Cuyahoga No. 106187, 2018-Ohio-2237, ¶ 10-13,

citing *State v. Owens*, 181 Ohio App.3d 725, 2009-Ohio-1508, 910 N.E.2d 1059, ¶ 69 (7th Dist.) Consequently, appellant has waived all but plain error. Crim.R. 12(C)(2). To reverse a decision based on plain error, a reviewing court must determine that a plain (or obvious) error affected the trial's outcome. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); Crim.R. 52(B); *State v. Tolbert*, 4th Dist. Washington No. 21CA2, 2022-Ohio-1159, ¶ 10. In addition, plain-error review must be undertaken "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Barnes* quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶19} This court held in *Tolbert* that a defendant can waive the right to indictment altogether, or, by plea, can acquiesce to the amendment of an offense's identity. *Tolbert* at ¶ 17, citing *State v. Battin*, 10th Dist. Franklin No. 19AP-485, 2019-Ohio-5001, ¶ 8-9, citing *State v. Bruce*, 10th Dist. Franklin No. 16AP-31, 2016-Ohio-7132. Moreover,

> "[A] guilty plea * * * renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Menna v. New York* (1975), 423 U.S. 61, 62, 96 S.Ct. 241, 46 L.Ed.2d 195, fn. 2. Therefore, a defendant who, like Fitzpatrick, voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel "may not thereafter raise independent claims

> related to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson (1973)*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235. See, also, *Ross v. Auglaize Cty. Common Pleas Court* (1972), 30 Ohio St.2d 323, 59 O.O.2d 385, 285 N.E.2d 25 (valid guilty plea by counseled defendant waives all nonjurisdictional defects in prior stages of proceedings); *State v. Spates* (1992), 64 Ohio St.3d 269, 271-273, 595 N.E.2d 351.

State v. Fitzpatrick, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78.

{¶20} We recognize, however, that although a guilty plea waives non-jurisdictional defects, a guilty plea does not waive a defendant's right to challenge a court's subject-matter jurisdiction. *State v. Moore*, 4th Dist. Lawrence No. 20CA10, 2022-Ohio-460, ¶ 19, citing *State v. Keslar*, 4th Dist. Hocking No. 98CA20, 1999 WL 1073961, * 3 (Nov. 17, 1999). "Subject-matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a particular class or type of case." *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 22; *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, ¶ 11-12, 34; *Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, ¶ 37 (Kennedy, J., concurring). The focus is whether the forum itself is competent to hear the controversy. *Id, citing* 18A Wright, Miller & Cooper, *Federal Practice and Procedure*, Section 4428, 6 (3d Ed.2017).

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{¶21} The Ohio Constitution provides that courts of common pleas "shall have such original jurisdiction over all justiciable matters * * * as may be provided by law." Ohio Constitution, Article IV, Section 4(B). R.C. 2931.03 provides that a common pleas court has original jurisdiction of all crimes and offenses. Thus, pursuant to R.C. 2931.03, "'a common pleas court has subject-matter jurisdiction over felony cases.'" *Harper*, *supra*, at ¶ 25, quoting *Smith v. Sheldon*, 157 Ohio St.3d 1, 2019-Ohio-1677, 131 N.E.3d 1, ¶ 8; *State ex rel. Mobarek v. Brown*, 10th Dist. Franklin No. 22AP-482, 2023-Ohio-436, ¶ 14.

{¶22} Recently, a defendant argued that a trial court lacked subject matter jurisdiction to accept his guilty plea because he was not indicted for the same offenses to which he pleaded guilty. The Supreme Court of Ohio held, however, that because Ohio's common pleas courts have original jurisdiction over "all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas," (R.C. 2931.03), the defendant had "essentially challenged the validity of his indictment, not the subject-matter jurisdiction of the trial court." *State ex rel. Mitchell v. Pittman*, 169 Ohio St.3d 357, 2022-Ohio-2542, 204 N.E.3d 534, ¶ 13. We find that case to be instructive.

{¶23} Here, the trial court acquired subject-matter jurisdiction when the state filed the felony indictment. *State ex rel. Mitchell v. Pittman*, 11th Dist. Portage No. 2021-P-0072, 2022-Ohio-106, ¶ 10. Moreover, the Tenth District held:

> [I]t is perfectly permissible to agree to plead guilty to a crime that has not been indicted. *State v. Long*, 10th Dist. No. 83AP-444, 1984 WL 5914, 1984 Ohio App. LEXIS 10927 *13 (Sept. 27, 1984), citing *Stacy v. Van Coren*, 18 Ohio St.2d 188, 248 N.E.2d 603 (1969). An indictment is merely a finding by a grand jury that there is probable cause to believe an individual committed a particular offense. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 39, 775 N.E.2d 829. A plea of guilty constitutes a complete admission that the individual actually committed the offense in question (which encompasses the question of whether there is probable cause to believe the individual committed the offense). Crim.R. 11(B)(1). By pleading guilty to felonious assault, Battin was agreeing that he was guilty of felonious assault, which obviated the need for a jury to adjudicate him guilty or for a grand jury to find probable cause to prosecute him for that offense.

State v. Battin, 10th Dist. Franklin No. 18AP-402, 2018-Ohio-3947, ¶ 9. We agree with the *Battin* court's analysis.

{¶24} Finally, appellant argues that the grand jury did not consider whether appellant possessed 3-Chloro-PCP as a controlled-substance analog measured by grams because the drug had been mixed with food. Trooper Kuehne testified that the lab instructed him to separate the drug from the food, but because the powder dissolved into the food he collected both. Appellant contends it is improper to aggregate the food and contraband to determine weight.

Appellee, however, points out that the weight of the substance determines only the punishment. R.C. 2925.11(C) and R.C. 2925.03(C). Thus, because the particular weight of this evidence is not a jurisdictional issue, appellant waived this argument when he entered his guilty pleas. *See Smith v. May*, 159 Ohio St.3d 106, 2020-Ohio-61, 148 N.E.3d 542, ¶ 37 (Kennedy, J., concurring)(subject matter jurisdiction refers to the constitutional or statutory power of a court to adjudicate a particular case or type of case * * * the focus is on whether the forum itself is competent to hear the controversy); *Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, at ¶ 78(guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.)

{¶25} Accordingly, for the foregoing reasons, we overrule appellant's first assignment of error.

II.

{¶26} In his second assignment of error, appellant asserts that he received ineffective assistance of counsel. In particular, appellant contends that counsel should have challenged the

controlled substance weight calculation and the validity of Counts 1 and 2 of the indictment. Thus, appellant argues that he has been prejudiced because a reasonable probability exists that the outcome would have been different had he challenged Counts 1 and 2, rather than accept a plea agreement.

{¶27} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has interpreted this to mean a criminal defendant is entitled to "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶28} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *Strickland,* 466 U.S. at 687; *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 183; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14; *State v. Blackburn*, 4th Dist. Jackson No. 18CA3, 2020-Ohio-1084, ¶ 32.

{¶29} It is important to recognize that a defendant has the ultimate authority to decide whether to plead guilty. *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 121, citing *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Therefore, a defendant who claims ineffective assistance of counsel related to the decision to plead guilty must show that a reasonable probability exists that, but for counsel's errors, the defendant would not have pleaded guilty and insisted on going to trial. *Id.*, citing *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 89, citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

{¶30} In the case sub judice, our review of the record indicates that trial counsel negotiated a plea to two of the five original charges and obtained from the state a community control recommendation. Appellant, however, did not receive community control because of his new indictment in Hamilton County and his failure to appear for sentencing. Obviously, counsel could not be responsible for either of these factors. Moreover, the trial court explicitly noted: "This plea agreement, Mr. Woodyard is very thorough, he generally reads through these to and with his clients word for word, was he able to do that with you today?" Appellant replied, "Yes." Further, appellant acknowledged that he understood

the allegations, the elements, and the recommended sentence.

{¶31} Therefore, based on the foregoing reasons, we conclude that appellant did not establish that he received ineffective assistance of counsel. Accordingly, we overrule appellant's second assignment of error.

III.

{¶32} In his third assignment of error, appellant asserts that he did not enter a knowing, intelligent, and voluntary plea. Appellant argues that "he was made to believe by authorities that Counts 1 and 2 stated F2 and F1 offenses because 3-Chloro-PCP was a schedule I or II drug and that 284 grams was 5-20 times bulk" and that he could be culpable for both the drug and food weight.

{¶33} In deciding whether to accept a plea, a court must determine whether a defendant is making the plea knowingly, intelligently, and voluntarily. *State v. McDaniel*, 4th Dist. Vinton No. 09CA677, 2010-Ohio-5215, ¶ 8. "'In considering whether a guilty plea was entered knowingly, intelligently and voluntarily, an appellate court examines the totality of the circumstances through a de novo review of the record to ensure that the trial court complied with constitutional and procedural safeguards.'"

(Emphasis sic.) *Id.*, quoting *State v. Eckler*, 4th Dist. Adams No. 09CA878, 2009-Ohio-7064, ¶ 48; *State v. Hearn*, 4th Dist. Washington No. 20CA7, 2021-Ohio-594, ¶ 18; *State v. Barner*, 4th Dist. Meigs No. 10CA9, 2012-Ohio-4584, ¶ 8; *State v. Willoughby*, 4th Dist. Pickaway No. 20CA5, 2021-Ohio-2611, ¶ 32.

{¶34} "Before accepting a guilty plea, the trial court should engage in a dialogue with the defendant as described in Crim.R. 11(C)." *McDaniel* at ¶ 8, citing *State v. Morrison*, 4th Dist. Adams No. 07CA854, 2008-Ohio-4913, ¶ 9. Crim.R. 11(C)(2) provides:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> * * *

{¶35} Substantial compliance with Crim.R. 11(C)(2)(a) is sufficient for a valid plea concerning nonconstitutional rights. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 14. "'Substantial compliance means that, under the totality of the circumstances, appellant subjectively understood the implications of his plea and the rights he waived.'" *McDanie*l at ¶

13, quoting *State v. Vinson*, 10th Dist. Franklin No. 08AP-903, 2009-Ohio-3240, ¶ 6. As the Supreme Court of Ohio explained in *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 32:

> When the trial judge does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial judge partially complied, e.g., by mentioning mandatory postrelease control without explaining it, the plea may be vacated only if the defendant demonstrates a prejudicial effect. The test for prejudice is "whether the plea would have otherwise been made." If the trial judge completely failed to comply with the rule, e.g., by not informing the defendant of a mandatory period of postrelease control, the plea must be vacated. "A complete failure to comply with the rule does not implicate an analysis of prejudice." (Emphasis sic.) (Citations omitted.)

{¶36} "Crim.R. 11(C)(2)(b) requires the trial court to inform the defendant of the effect of his guilty or no-contest plea and to determine whether he understands that effect." *State v. Jones*, 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, ¶ 12; *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 10-12. "To satisfy the effect-of-plea requirement under Crim.R. 11(C)(2)(b), a trial court must inform the defendant, either orally or in writing of the appropriate language of Crim.R. 11(B)." Jones at ¶ 25, 51. Further, a trial court must also inform the defendant that upon acceptance of his pleas, it "may proceed with judgment and sentence." Crim.R. 11(C)(2)(b).

{¶37} At the May 4, 2022 change of plea hearing, the state agreed to amend the indictment, dismiss other charges, and recommend 24 months of community control. The trial court addressed appellant, discussed the charges and maximum sentence, reviewed the agreed sentence, and explained the various rights appellant would waive with his guilty plea. Appellant indicated multiple times that he understood the implications of his plea, including that Hamilton County could revoke his probation in that case and require him to serve a prison term. Moreover, the court explicitly stated: "This plea agreement, Mr. Woodyard is very thorough, he generally reads through these to and with his clients word for word, was he able to do that with you today?" Appellant replied, "Yes." Further, appellant acknowledged that he understood the allegations, the elements, and the recommended sentence.

{¶38} After our review in the case sub judice, we believe that the trial court complied with the applicable rules. Further, appellant acknowledged that he understood the implications of his plea and the various rights he would waive through a guilty plea. Appellant, represented by counsel at the plea hearing, did not assert his innocence. We find nothing to suggest any confusion or lack of understanding regarding the effect of his plea. Unfortunately for appellant, at sentencing the court took into

account his post-plea actions that also resulted in additional criminal charges.

{¶39} Therefore, because appellant failed to establish prejudice, we conclude that appellant knowingly, voluntarily, and intelligently entered his guilty pleas and we overrule appellant's third assignment of error.

IV.

{¶40} In his final assignment of error, appellant asserts that to deny appellate counsel the ability to retain a copy of appellant's pre-sentence investigation (PSI) report in order to investigate, research, and present issues for appeal is improper. In particular, appellant contends that appellate counsel had to drive many hours to view the document and counsel could only view the PSI and make notes, rather than retain a copy for later use. Appellant states, "[i]n the undersigned's experience, Ohio courts treat a PSI as a confidential document."

{¶41} Crim.R. 32.2 and R.C. 2951.03 address presentence investigation reports. Crim.R. 32.2 provides:

> Unless the defendant and the prosecutor in the case agree to waive the presentence investigation report, the court shall, in felony cases, order a presentence investigation and report before imposing community control sanctions or granting probation. The court may order a presentence investigation report notwithstanding the agreement to waive the report. In misdemeanor cases the court may order

a presentence investigation before granting probation.

R.C. 2951.03(A)(1) provides, "No person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court." The report must address the circumstances of the offense; the criminal record, social history, and present condition of the defendant; and, possibly, the victims' statements regarding the offense's impact. *Id.*; *State v. Johnson*, 138 Ohio St.3d 282, 2014-Ohio-770, 6 N.E.3d 38, ¶ 8.

{¶42} R.C. 2951.03 permits access to the report in certain circumstances. R.C. 2951.03(B)(1) instructs that "the court, at a reasonable time before imposing sentence, shall permit the defendant or the defendant's counsel to read the report," with some exceptions. Further, as per R.C. 2951.03(B)(2), "[p]rior to sentencing, the court shall permit the defendant and the defendant's counsel to comment on the presentence investigation report and, in its discretion, may permit the defendant and the defendant's counsel to introduce testimony or other information that relates to any alleged factual inaccuracy contained in the report."

{¶43} In addition, R.C. 2951.03(D)(1) provides when the

defendant and defendant's counsel may seek access to the presentence investigation report, which is otherwise "confidential information" and "not a public record":

> The court, an appellate court, * * * the defendant, the defendant's counsel, the prosecutor who is handling the prosecution of the case against the defendant, * * * may inspect, receive copies of, retain copies of, and use a presentence investigation report * * * only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.

{¶44} Relevant to the case at bar, pursuant to R.C. 2951.03(D)(2) the defendant, the defendant's counsel, and the prosecutor may not make copies of the report, but instead must return the report to the court "[i]mmediately following the imposition of sentence upon the defendant," and per R.C. 2951.03(D)(3), the "court or other authorized holder of the report * * * shall retain the report * * * under seal," except when it is being used for specified purposes. R.C. 2951.03(D)(2) and (3); *Johnson* at ¶ 11. In *Johnson,* the supreme court held that newly appointed appellate counsel may access a presentence investigation report upon a proper showing, subject to similar restrictions as in R.C. 2951.03 and 2953.08(F)(1), and any further appellate court directives. *Id.* at ¶ 14. Thus, appellate counsel is permitted access for appellant's first appeal as of right. *See also State v.*

Vasquez, 9th Dist. Summit No. 29858, 2021-Ohio-3453 (access to PSI denied when defendant sought PSI for use in future petition for post-conviction relief, noting due process implications of *Johnson* not present).

{¶45} While we certainly understand and appreciate appellate counsel's frustration, as an intermediate appellate court we are obligated to follow Supreme Court of Ohio decisions. Under the relevant statutes and under *Johnson*, access to the PSI is very limited. *Johnson* permits appellate counsel to have access to a defendant's PSI, but does not permit unlimited access. This court may not enlarge the *Johnson* holding. Thus, we conclude that R.C. 2951.03 does not permit appellant to retain a copy of the presentence investigation report.

{¶46} Therefore, based on the foregoing reasons we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal

commences from the date of filing with the clerk.