Supreme Court of Ohio Clerk of Court - Filed November 04, 2015 - Case No. 2015-1782

[Cite as *State v. Smith*, 2014-Ohio-5303.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellant,	:	No. 14AP-154 (C.P.C. No. 12CR-5477)
v.	:	No. 14AP-155 (C.P.C. No. 12CR-3898)
Thomas C. Smith,	:	
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 28, 2014

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Joseph R. Landusky, II, for appellee.

APPEALS from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Plaintiff-appellant, State of Ohio ("the state"), appeals from a judgment of the Franklin County Court of Common Pleas granting a motion to dismiss the charges and indictments against defendant-appellee, Thomas C. Smith ("appellee"). Because we conclude that, at the times relevant to the indictments, Ohio law did not clearly define the acts alleged in the indictments to be criminal offenses, we affirm.

{¶ 2} Appellee operates several shops in Columbus, Ohio, which are involved in the sale of products that might be referred to as "adult novelties." In August and October of 2012, appellee was indicted on multiple criminal charges related to the sale of certain products at those shops. In common pleas case No. 12CR-3898, filed in August 2012, appellee was indicted on two counts of "trafficking in spice," with the charges asserting that, on or about February 8, 2012, appellee knowingly sold or offered to sell "a controlled substance included in Schedule I, to wit: AM 2201, which is an analog controlled

substance as defined in section 3719.01 of the Ohio Revised Code, as defined in section 2925.01 of the Ohio Revised Code." The indictment in 12CR-3898 also charged appellee with three counts of aggravated trafficking in drugs, asserting that on or about February 8 and May 2, 2012, he knowingly sold or offered to sell "a controlled substance included in Schedule I, to wit: a-PVP, which is an analog controlled substance as defined in section 3719.01 of the Ohio Revised Code, as defined in section 2925.01 of the Ohio Revised Code." In October 2012, appellee was indicted in common pleas case No. 12CR-5477 on five counts of aggravated possession of drugs and five counts of aggravated trafficking in drugs. These charges alleged that, on or about May 2 and July 25, 2012, appellee knowingly possessed or distributed "a controlled substance included in Schedule I, to wit: a-PVP which is a controlled substance analog, as defined in section 3719.01 of the Ohio Revised Code, commonly known as Bath Salts."

{¶ 3} Appellee moved to dismiss the indictments and charges in both cases, asserting that, at the times relevant to the indictments, sale or possession of a controlled substance analog were not defined as criminal offenses under Ohio law. Following a hearing, the trial court found that, at the time of appellee's alleged acts, the statutory definition of controlled substance analog was not incorporated into criminal law, effectively concluding that possession or sale of controlled substance analogs were not criminal offenses. The trial court entered a judgment granting appellee's motion to dismiss the indictments and charges against him.

{¶ 4} The state appeals from the trial court's judgment, assigning one error for this court's review:

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS WHEN THE STATUTORY SCHEME IN EXISTENCE AT THE TIME OF THE OFFENSES PROHIBITED TRAFFICKING AND POSSESSION OF SCHEDULE I SUBSTANCES THAT WERE CONTROLLED SUBSTANCE ANALOGS.

Standard of Review

{¶ 5} We review de novo a trial court's legal conclusions in granting a motion to dismiss criminal charges. *State v. Wilson*, 10th Dist. No. 13AP-205, 2013-Ohio-4799, ¶ 4; *State v. Walker*, 10th Dist. No. 06AP-810, 2007-Ohio-4666, ¶ 9. At issue in this appeal is

whether Ohio law defined possession or sale of a controlled substance analog as a criminal offense during the period from February through July of 2012 when appellee is alleged to have possessed and sold compounds referred to as AM 2201 and a-PVP. In granting the motion to dismiss, the trial court concluded that, at the relevant times, the law did not define these acts as criminal offenses. "When an appellate court is called on to review a trial court's interpretation and application of a statute, the 'appellate court conducts a de novo review, without deference to the trial court's determination.' " *State v. Willig*, 10th Dist. No. 09AP-925, 2010-Ohio-2560, ¶ 14 (citations omitted).

Regulation of "Controlled Substance Analog" Chemicals or Compounds

{¶ 6} In 1986, the United States Congress acted to address the problem of "underground chemists who tinker with the molecular structure of controlled substances to create new drugs that are not [classified as] scheduled [controlled substances]" by enacting the Controlled Substance Analogue Enforcement Act of 1986 as part of the Anti-Drug Abuse Act of 1986. *United States v. Forbes*, 806 F.Supp. 232, 236 (D.Colo.1992). *See United States v. Klecker*, 348 F.3d 69, 70 (4th Cir.2003) ("Congress enacted the Analogue Act to prevent underground chemists from altering illegal drugs in order to create new drugs that are similar to their precursors in effect but are not subject to the restrictions imposed on controlled substances.") *See also* Anti-Drug Abuse Act of 1986, Subtitle E–Controlled Substance Analogue Enforcement Act of 1986, P.L. 99-570. As part of that act, Congress created a definition of "controlled substance analogue."[1] 21 U.S.C. 802(32). Congress further provided that, for purposes of federal law, a "controlled substance analogue" shall be treated as a controlled substance in schedule I. 21 U.S.C. 813.

{¶ 7} The Ohio General Assembly enacted a similar measure, Substitute House Bill 64 ("House Bill 64"), in 2011. 2011 Sub.H.B. No. 64. Under that legislation, 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

[1] We note here a minor difference in the spelling of one of the key terms relevant to this decision. Federal law refers to a chemical substance "analogue," while the Revised Code refers to a chemical substance "analog." For purposes of this decision, we will employ the same spelling chosen by each legislative body-i.e., "analogue" when referring to federal law and "analog" when referring to the Revised Code.

Revised Code as a controlled substance in schedule I." 2011 Sub.H.B. No. 64. The legislation also made certain changes that will be discussed more fully below to R.C. 2925.03 and 2925.11, related to the possession and sale of certain chemicals referred to as "spice." The amendments and new statutes enacted under House Bill 64 became effective on October 17, 2011. The General Assembly subsequently passed additional legislation in 2012 amending many of the sections of law relevant to this appeal, but those amendments became effective on December 20, 2012. 2012 Sub.H.B. No. 334. Therefore, at the time of the alleged acts giving rise to the charges against appellee, the law as amended by House Bill 64 controlled.

Application of R.C. 2925.03 and 2925.11 Following Enactment of House Bill 64

{¶ 8} As the Supreme Court of Ohio has recognized, "all conduct is innocent unless there is a statute that criminalizes it." *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, ¶ 8. In order for an act to constitute a crime under Ohio law, it must be defined as an offense in the Ohio Revised Code. R.C. 2901.03(A). "An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty." R.C. 2901.03(B). *See also State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, ¶ 10 ("In Ohio, all criminal offenses are statutory, and the elements necessary to constitute a crime must be gathered wholly from the statute."). Accordingly, we must determine whether, at the times relative to this appeal, the law contained a positive prohibition on the possession or sale of "controlled substance analogs" and provided a penalty for violating that prohibition.

{¶ 9} Courts apply the "rule of lenity" when faced with ambiguity in a criminal statute. *See State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, ¶ 10 ("This canon of strict construction, also known as the rule of lenity, is codified in R.C. 2901.04(A), which provides that sections of the Revised Code that define offenses or penalties 'shall be strictly construed against the state, and liberally construed in favor of the accused.' "). "Under the rule [of lenity], ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is *clearly* proscribed." (Emphasis added.) *Id. See*

also Columbus v. DeLong, 173 Ohio St. 81, 83 (1962) ("[P]enal statutes or ordinances are to be interpreted strictly against the state or a municipality and liberally in favor of an accused.").

{¶ 10} The state argues that possession and sale of controlled substance analogs were prohibited at the time of appellee's alleged acts because the law contained a definition of "controlled substance analog" and provided that, "for purposes of any provision of the Revised Code," a controlled substance analog would be treated as a schedule I controlled substance. *See* R.C. 3719.01(HH) and 3719.013 (2012). The state further asserts that House Bill 64 demonstrates clear legislative intent to prohibit and penalize possession and sale of controlled substance analogs.

{¶ 11} Between the two criminal cases, appellee was charged with eight counts of aggravated trafficking in drugs in violation of R.C. 2925.03 and five counts of aggravated possession of drugs in violation of R.C. 2925.11. The caption of the indictment in case No. 12CR-3898 indicates that appellant was also charged with two counts of "trafficking in spice" in violation of R.C. 2925.03. This will be discussed more fully below. With respect to the charges of aggravated trafficking in drugs, at the times relevant to this appeal, R.C. 2925.03 prohibited "sell[ing] or offer[ing] to sell a controlled substance." R.C. 2925.03(A)(1) (2012). The law also prohibited "prepar[ing] for shipment, ship[ping], transport[ing], deliver[ing], prepar[ing] for distribution, or distribut[ing] a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." R.C. 2925.03(A)(2) (2012). With respect to the charges of aggravated possession of drugs, at the times relevant to this appeal, the law provided that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A) (2012).

{¶ 12} At the time of these alleged acts, Chapter 2925 of the Revised Code, governing criminal drug offenses, defined certain terms by incorporating the definitions contained in Chapter 3719 of the Revised Code:

> As used in this chapter:
>
> (A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacturer," "official written

> order," "person," "pharmacist," "pharmacy," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meanings as in section 3719.01 of the Revised Code.
>
> (B) "Drug dependent person" and "drug of abuse" have the same meanings as in section 3719.011 of the Revised Code.
>
> * * *
>
> (AA) "Marihuana" has the same meaning as in section 3719.01 of the Revised Code, except that it does not include hashish.

R.C. 2925.01 (2012). Notably, the list of definitions contained in R.C. 2925.01(A) at the time did not expressly incorporate the definition of "controlled substance analog" created in House Bill 64 and codified as R.C. 3719.01(HH). "The canon [of statutory construction] expressio unius est exlusio alterius tells us that the express inclusion of one thing implies the exclusion of the other." *Myers v. Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶ 24. Thus, arguably, by creating a definition of "controlled substance analog" in R.C. 3719.01(HH) under House Bill 64 but failing to incorporate that definition into R.C. 2925.01, the General Assembly *excluded* that definition from applying in the context of the criminal drug offense statutes. *See, e.g., Hoops v. United Telephone Co. of Ohio*, 50 Ohio St.3d 97, 101 (1990) ("The General Assembly is presumed to have known that its designation of a remedy would be construed to exclude other remedies, consistent with the statutory construction maxim of *expressio unius est exclusion alterius*."). R.C. 3719.01 expressly states that the definitions contained therein, including the definition of "controlled substance analog" under R.C. 3719.01(HH) apply "[a]s used in this chapter"—i.e., Chapter 3719 of the Revised Code. *See, e.g., Morgenstern v. Nationwide Agribusiness Ins. Co.*, 78 Fed.Appx. 485, 491 (6th Cir.2003) ("Further indication that § 2744.01 is inapplicable is its express limitation of the definition of 'employee' to 'as used in this chapter.' "). Moreover, the preamble to House Bill 64 indicated that one of the 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. 2011 Sub.H.B. No. 64.

{¶ 13} The ambiguity under the law as amended by House Bill 64 is also demonstrated by comparing the treatment of controlled substance analogs with the treatment of certain chemical compounds referred to as "spice." Under House Bill 64, the General Assembly amended R.C. 2925.03 to provide that, if an individual sold certain specified chemical compounds, as defined in the law, the individual was guilty of "trafficking in spice." R.C. 2925.03(C)(8) (2012). The legislation likewise amended R.C. 2925.11 to provide that, if an individual possessed those specified chemical compounds, the individual was guilty of "possession of spice." R.C. 2925.11(C)(8) (2012). House Bill 64 also added those specified compounds to the list of schedule I drugs. R.C. 3719.41(C)(35)-(39) (2012). By contrast, the General Assembly did not amend R.C. 2925.03 or 2925.11 to expressly prohibit the sale or possession of controlled substance analogs and did not amend any part of Chapter 2925 to explicitly refer to controlled substance analogs and, as relevant to this case, AM 2201 and a-PVP.

{¶ 14} The state argues that R.C. 3719.013, providing that a controlled substance analog "shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I," necessarily incorporated controlled substance analogs into all parts of the Revised Code addressing schedule I controlled substances, including R.C. 2925.01, 2925.03, and 2925.11. However, we note that Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement. *See, e.g.,* R.C. 3719.02 (providing for licensure as manufacturer of controlled substances), R.C. 3719.021 (providing for licensure as wholesaler of controlled substances), R.C. 3719.05 (providing rules for dispensation of controlled substances by pharmacists), and R.C. 3719.06 (providing rules for prescription of controlled substances by licensed health professionals). Moreover, at the relevant time, there were no cross-references or any other indicators in Chapter 2925 to provide notice that the treatment of controlled substance analogs under Chapter 3719 also applied to Chapter 2925. Also confusing is R.C. 3719.01(HH)(2)(a), which states that " 'controlled substance analog' does not include any of the following: (a) A controlled substance," seemingly contradicting R.C. 3719.013.

{¶ 15} As noted above, House Bill 64 was similar to the federal Controlled Substance Analogue Enforcement Act of 1986. However, the placement of the relevant provisions within the overall statutory structure also demonstrates a notable distinction

between the two measures. Under the Controlled Substance Analogue Enforcement Act of 1986, all of the relevant provisions, including the definition of "controlled substance analogue" and the requirement that such analogues be treated as controlled substances, were placed into the same portion of federal law that contained the prohibitions on possession and sale of controlled substances—i.e., Subchapter I ("Control and Enforcement") of Chapter 13 ("Drug Abuse Prevention and Control") of Title 21 ("Food and Drugs") of the United States Code. *See* 21 U.S.C. 802(32) (defining "controlled substance analogue"); 21 U.S.C. 813 (providing that controlled substance analogues shall be treated as controlled substances); and 21 U.S.C. 841(a)(1) (prohibiting the manufacture, distribution, or dispensation of controlled substances, or possession of controlled substances with intent to manufacture, distribute, or dispense). By contrast, House Bill 64 placed the controlled substance analog provisions in Chapter 3719 separate from the prohibitions and penalties set forth in Chapter 2925, and failed to incorporate any explicit cross-references in Chapter 2925 to the controlled substance analog provisions.

{¶ 16} Applying the rule of lenity, which requires us to construe ambiguity in criminal statutes strictly so as to apply only to conduct that is *clearly* proscribed, we conclude that, during the period from February through July of 2012, 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. *See* R.C. 2901.03(B). Accordingly, the acts appellee is alleged to have committed were not clearly defined as criminal offenses under the law as it existed at the time. The trial court did not err by granting appellee's motion to dismiss the indictments against him.

"Trafficking in Spice" Charges

{¶ 17} The caption of the indictment against appellee in common pleas case No. 12CR-3898 indicates that he was charged with two counts of "trafficking in spice." As explained above, House Bill 64 amended R.C. 2925.03 to create the offense of "trafficking in spice." R.C. 2925.03(C)(8) (2012). Thus, the state argues that, even if the trial court correctly dismissed the charges against appellee for possession and sale of chemical substance analogs, the motion to dismiss should have been denied as to the two counts of trafficking in spice.

{¶ 18} The state did not argue before the trial court that Counts 1 and 2 of the indictment alleging trafficking in spice in the caption should be differentiated from Counts 3, 4, and 5 of the indictment. Rather, the state argued that trafficking in AM 2201 and a-PVP, as controlled substance analogs, was prohibited at the time of offense. The state also did not move to amend the indictment to conform to the body of Counts 1 and 2 of the indictment to the caption. Accordingly, the state has waived this argument.

{¶ 19} Nevertheless, we note that there is no dispute that trafficking in spice was clearly prohibited at the times relevant to this appeal. The prohibition on the sale of "spice" provided as follows:

> If the drug involved in the violation is 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethyl-heptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol or a compound, mixture, preparation, or substance containing 1-Pentyl-3-(1-naphthoyl)indole, 1-Butyl-3-(1-naphthoyl)indole, 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole, 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol, whoever violates division (A) of this section is guilty of trafficking in spice.

R.C. 2925.03(C)(8) (2012).

{¶ 20} Under this provision, the offense of trafficking in spice was limited to the sale of one of several explicitly defined chemicals or a compound, mixture, or substance containing one of those chemicals. Those chemicals constituting "spice" drugs were also contained in the list of schedule I controlled substances. R.C. 3719.41(C)(35)-(39) (2012).

{¶ 21} Although the caption of the indictment in case No. 12CR-3898 indicates that appellee was charged with two counts of trafficking in spice, as noted above, the body of the indictment alleges with respect to both counts that appellee sold or offered for sale "AM 2201, which is an analog controlled substance." Likewise, a laboratory report from the Bureau of Criminal Identification and Investigation contained in the record indicates that a tested sample contained 1-(5-fluoropentyl)-3-(1-naphthoyl)indole, parenthetically identified as AM 2201. The report further indicated that the AM 2201 sample had a

chemical structure that was "substantially similar" to 1-pentyl-3-(1-naphthoyl)indole. Thus, contrary to the caption of the indictment, appellant was not actually charged with selling or offering to sell one of the "spice" chemicals whose sale was prohibited under R.C. 2925.03(C)(8) but, rather, with selling or offering to sell an analog of one of those chemicals. Under the same reasoning set forth above, we conclude that, at the relevant time, the law did not clearly state a positive prohibition on the sale of analogs of the chemicals defined as part of the prohibition on trafficking in spice under R.C. 2925.03(C)(8). Therefore, the trial court did not err by granting appellee's motion to dismiss with respect to these two charges.

{¶ 22} For the foregoing reasons, we overrule the state's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and O'GRADY, JJ., concur.

[Cite as *State v. Mohammad*, 2015-Ohio-1234.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ,	:	
Plaintiff-Appellant,	:	
v.	:	Nos. 14AP-662 and 14AP-871 (C.P.C. No. 13CR-592)
Ghassan Mohammad,	:	
Defendant-Appellee.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 31, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Meeks and Thomas Co., LPA, David H. Thomas and *Kathryn S. Wallrabenstein*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing the dismissal of charges against Ghassan Mohammad. Two separate appeals are pending because the trial court judge assigned to the case initially ordered that two of the three charges were to be dismissed initially and then followed that ruling with a judgment entry which dismissed the case entirely.

{¶ 2} The assignments of error set forth in the two different briefs filed by the State are:

{¶ 3} In 14AP-662:

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS WHEN THE STATUTORY SCHEME IN EXISTENCE AT THE TIME OF THE OFFENSES PROHIBITIED TRAFFICKING AND POSSESSION OF SCHEDULE I SUBSTANCES THAT WERE CONTROLLED SUBSTANCE ANALOGS.

{¶ 4} In 14AP-871:

> THE TRIAL COURT ERRED IN FILING THE "ENTRY TERMINATING CASE" WHEN THE COURT HAD ONLY DISMISSED TWO OF THE THREE COUNTS, WHEN THE STATE'S APPEAL THEREFROM REMAINED PENDING, AND WHEN THE THIRD CHARGE FOR TAMPERING WITH EVIDENCE REMAINED PENDING.

{¶ 5} Addressing the assigned error in 14AP-662, the trial court dismissed two charges because the trial found that the legislature had not criminalized the possession of a controlled substance analog at the time alleged in the indictment of Ghassan Mohammad. The trial court further found that subsequent amendment of the pertinent statutes and pursuit of Ghassan Mohammad was barred by the ex post facto clauses of the United States Constitution and the Ohio Constitution.

{¶ 6} The state of Ohio, as indicated by its assignment of error, argues that possession of controlled substance analogs was illegal before the Ohio Legislature passed a law in December 2012 which purported to "create" an offense of possession of a controlled substance analog.

{¶ 7} The specific substance mentioned in the indictment is a-PVP, commonly known as bath salts. The legislature made statutory changes which were effective in December 2012. However, Ghassan Mohammad apparently possessed bath salts in August 2012.

{¶ 8} The state of Ohio has consistently contended that R.C. 3719.013 made possession of bath salts and other controlled substance analogs illegal before the legislature claimed it enacted the offense. The problem for the state of Ohio is that R.C. 3719.013 was not part of the definition of a drug of abuse under Title 29 of the Ohio Revised Code, the title which defines criminal drug offenses.

{¶ 9} The legislature addressed some issues in Sub.H.B. No. 64, which was effective in October 2011, but did so in the context of Title 37. The legislature defined controlled substance analog in R.C. 3719.01(HH)(1).

{¶ 10} The legislature enacted a new R.C. 3719.013 at the same time. R.C. 3719.013 provided:

> Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, 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.

{¶ 11} This presented practical problems. Bath salts which were to be used as bath salts were perfectly legal. Bath salts "intended for human consumption" were illegal to possess. The statute is silent as to the issue of intended by whom. The manufacturer? The merchant selling the bath salts? The purchaser who wants to use them in bath water? A teenage member of the purchaser's family who has heard they can be used to get high? What happens if that teenager later decides to use the bath salts in the bath water instead?

{¶ 12} Sub.H.B. No. 64 was unworkable and needed the subsequent clarifications which were effective in December 2012.

{¶ 13} A panel of this court addressed the primary issue in this case in *State v. Smith*, case No. 14AP-154 and 14AP-155, decided November 28, 2014. The panel noted 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 Sub.H.B. No. 64 and therefore the panel found possession of controlled substance analogs had not yet been criminalized. We follow the *Smith* case today.

{¶ 14} The assignment of error in case No. 14AP-662 is overruled.

{¶ 15} The assignment of error in case No. 14AP-871 addresses the question of whether the whole case should have been dismissed, or only the counts pertaining to the possession of bath salts. Appellate counsel for Ghassan Mohammad has not separately briefed this issue. Counsel for the state of Ohio has acknowledged that the third charge, one of tampering with evidence, alleges that Ghassan Mohammad altered, destroyed, concealed or removed bath salts with a purpose to impair its value or availability as evidence in a proceeding or investigation.

{¶ 16} The merits of the dismissal of the tampering with evidence charge were not fully developed in the trial court and were not considered or addressed by the trial court. Accordingly, we sustain the assignment of error in 14AP-871.

{¶ 17} As a result, we affirm the trial court's ruling as to possession of bath salts under 14AP-662. We reverse the trial court's ruling dismissing the tampering with evidence charge as questioned in 14AP-871 and remand the case for further proceedings with respect to the tampering with evidence charge.

Judgment affirmed in part and reversed in part; remanded for further proceedings.

BROWN, P.J., and SADLER, J., concur.

[Cite as *State v. Mobarak*, 2015-Ohio-3007.]

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.