

COURT OF APPEALS  
MORGAN COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	John W. Wise, J.
	:	Julie A. Edwards, J.
-vs-	:	
	:	Case No. CA-04-006
DOUGLAS K. KALTENBACH	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal Appeal From Morgan County  
Court of Common Pleas Case CR-02-080

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: 7/22/05

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Edwards, J.*

{¶1} Defendant-appellant Douglas K. Kaltenbach appeals from his conviction and sentence on two counts of trafficking in drugs, in violation of R.C. 2925.03(A)(1)(C)(3)(b), and R. C. 2925.03(A)(2)(C)(3)(c), respectively, and one count of having weapons under disability, in violation of R.C. 2923.13(A)(3). The plaintiff-appellee is the State of Ohio.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On December 12, 2002, appellant was indicted by the Morgan County Grand Jury. In total, appellant was indicted on five counts: Count I - trafficking in drugs, in violation of R.C. 2925.03(A)(1)(C)(3)(b), with specifications of forfeiture of real estate and currency; Count II - trafficking in drugs, in violation of R.C. 2925.03(A)(2)(C)(3)(c), with specifications for forfeiture of real estate and currency; Count III – weapons under disability in violation of R.C. 2923.13(A)(3); Count IV – engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A)(1), with specifications for forfeiture of real estate and currency; and Count V – conspiracy, in violation of R. C. 2923.01(A)(2), with specifications for forfeiture of real estate and currency.

{¶3} Subsequently, on April 14, 2004, appellant entered a plea of guilty to Count I, trafficking in drugs (F4) and Count II, trafficking in drugs (F3) and weapons while under disability (F5). This plea was entered as part of a plea agreement in which appellant agreed to plead guilty to the aforementioned offenses and the State agreed that Count IV, engaging in a pattern of corrupt activity and Count V, conspiracy would be dismissed. In addition, the State agreed to recommend a prison term not to exceed four years of incarceration. In addition, the State agreed that it would not pursue

forfeiture of the real estate, leaving the issue of forfeiture of currency and weapons for the trial court to decide at the time of sentencing.

{¶4} Appellant was sentenced on June 21, 2004. The trial court ruled that the currency would be forfeited to the State of Ohio. As to the weapons, the trial court ruled that the weapons would be returned to Shawn Kaltenbach. The trial court then proceeded to sentence appellant to a definite sentence of four years in prison on Count II, 17 months in prison on Count I, 11 months in prison on Count III, with all counts to be served concurrently. In addition, the trial court ordered that appellant pay a fine of \$2,500.00 on Count III.

{¶5} It is from this conviction and sentence that appellant appeals, raising the following sole assignment of error:

{¶6} “APPELLANT/DEFENDANT WAS PREJUDICE [SIC] BY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL SUGGESTED THAT HE ACCEPT A PLEA BARGAINING [SIC] TO TWO COUNTS OF TRAFFICKING IN DRUGS WHICH WERE INVALID.”

{¶7} In the sole assignment of error, appellant contends that his trial counsel provided ineffective assistance of counsel when counsel failed to review the indictment and recognize that the indictment failed to include an essential element of the charge, namely the mens rea. We disagree.

{¶8} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced

by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶9} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, supra at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, there is a strong presumption that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶10} In order to warrant a reversal, appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, (citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180).

{¶11} In this case, we find that appellant's argument fails because there was no defect in the indictment. Therefore, appellant's counsel's representation did not fall below an objective standard of reasonable representation.

{¶12} Appellant asserts that counts I and II alleging that appellant was trafficking in drugs, were missing the essential element of the mens rea.<sup>1</sup> Appellant argues that these counts would have been dismissed had trial counsel filed a motion to dismiss. Once it was established that those counts had to be dismissed, appellant asserts that the trial court would have been required to dismiss count IV, engaging in a

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<sup>1</sup> Specifically, appellant argues that R.C. 2925.03(A) states that "No person shall knowingly sell or offer to sell a controlled substance." Thus, appellant contends that the mens rea was knowingly and should have been so indicated in the indictment.

pattern of corrupt activity, and count V, conspiracy, because those counts were based upon the trafficking in drugs counts.

{¶13} However, when the indictment cites to the relevant statute under which a defendant is being charged and that statute includes a statement of the applicable mens rea, the indictment is sufficient. *State v. McKenzie* (Sept. 18, 1998), Erie App. No. E-97-040, 1998 WL 636784. Counts I and II allege that appellant sold or offered to sell marijuana in the vicinity of a juvenile, in violation of R.C. 2925.03(A)(1)(C) (3)(b) and prepared marijuana, in an amount greater than 200 grams but less than 1000 grams, for shipment or distribution in the vicinity of a juvenile, in violation of R.C. 2925.03(A)(2)(C)(3)(c). Revised Code 2925.03(A) states, in relevant part, that “[n]o person shall knowingly . . . [s]ell or offer to sell a controlled substance [or] prepare for shipment...or distribute a controlled substance.”<sup>2</sup> (Emphasis added). Thus, counts I and II of the indictment refer to the relevant statute under which appellant is charged and that statute states that the applicable mens rea is “knowingly.”

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<sup>2</sup> For the sake of clarity, we note that the mens rea of knowingly does not apply to the element of “in the vicinity of a juvenile. An offender’s mental state is irrelevant in determining if the offender committed an offense “in the vicinity of a juvenile.” *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770.

{¶14} Accordingly, appellant's sole assignment of error is overruled.

{¶15} The judgment of the Morgan County Court of Common Pleas is affirmed.

By: Edwards, J.

Farmer, P.J. and

Wise, J. concur

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JUDGES

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