

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-10-009

Appellee

Trial Court No. 09CR126

v.

Alan L. Miller

DECISION AND JUDGMENT

Appellant

Decided: October 22, 2010

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

Jordan J. Grant, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Alan L. Miller, appeals from his conviction in the Fulton County Court of Common Pleas for operating a vehicle while intoxicated. For the reasons that follow, we affirm.

{¶ 2} On December 28, 2009, appellant entered a no contest plea to one count of operating a vehicle while intoxicated, a violation of R.C. 4511.19(A)(1)(j)(viii)(II) and a

felony of the fourth degree. As part of his plea agreement, appellant preserved his right to appeal the trial court's granting of the state's pretrial motion in limine. He was sentenced to a two year prison term. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The defense attorney at the trial level was ineffective at counsel because he failed to challenge the constitutionality of ORC 4511.19(A)(1)(j)(viii)(II) for being too vague and overbroad.

{¶ 4} "II. The trial court erred in granting the state's in limine motion prohibiting the defense from introducing expert testimony regarding the differences between metabolites found in the blood which determine a person's intoxication and whether it fits in the statutory scheme of ORC 4511.19(A)(1)(j)(viii)(II). "

{¶ 5} In his first assignment of error, appellant contends that his counsel was ineffective in failing to challenge the constitutionality of R.C. 4511.19(A)(1)(j)(viii)(II). Specifically, appellant contends the statute is unconstitutionally vague.

{¶ 6} To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. This standard requires appellant to satisfy a two-prong test. First, appellant must show that counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington* (1984),

466 U.S. 668. This test is applied in the context of Ohio law that states that a properly licensed attorney is presumed competent. *State v. Hamblin* (1988), 37 Ohio St.3d 153.

{¶ 7} Appellant was convicted of violating R.C. 4511.19(A)(1)(j)(viii)(II) which states:

{¶ 8} "No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶ 9} "* * *

{¶ 10} "Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:

{¶ 11} "* * *

{¶ 12} "Either of the following applies:

{¶ 13} "* * *

{¶ 14} "(II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma."

{¶ 15} There is a strong presumption that such statutes are constitutional. *State v. Anderson* (1991), 57 Ohio St.3d 168. "A statute is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his or her contemplated conduct is forbidden, or if the statute encourages arbitrary and discriminatory enforcement." *State v. Moore* (Sept. 6, 2000), 9th Dist. No. 19544, discretionary appeal not allowed, 90 Ohio St.3d 1403, following *Kolender v. Lawson* (1983), 461 U.S. 352, 357.

{¶ 16} Appellant contends that R.C. 4511.19(A)(1)(j)(viii)(II) is unconstitutionally vague in that it fails to specify the particular metabolite presence that is prohibited. In support, appellant submitted medical articles explaining that not all metabolite presence indicates a driver is impaired. Rather, some metabolite presence merely indicates prior use of marijuana.

{¶ 17} While this distinction may have merit, the legislature has nevertheless chosen to view all metabolite presence the same and to prohibit particular concentrations. As such, we cannot say that the above statute is unconstitutionally vague.

{¶ 18} Moreover, when a defendant pleads guilty or no contest, he waives his right to assert an ineffective assistance of counsel claim on appeal except to the extent the defects complained of caused the plea to be less than knowing, intelligent, and voluntary. *State v. Barnett* (1991), 73 Ohio App.3d 244; *State v. Ward* (Dec. 12, 2003), 6th Dist. Nos. L-02-1281, L-02-1283, 2003-Ohio-6764, ¶ 10. Appellant has not even alleged, much less demonstrated, that his trial counsel's failure to challenge the constitutionality

of R.C. 4511.19(A)(1)(j)(viii)(II) rendered his plea other than knowing, intelligent and voluntary. Appellant's first assignment of error is found not well-taken.

{¶ 19} In his second assignment of error, appellant contends that the court erred in granting the state's motion in limine before appellant entered his plea. A motion in limine is a request "that the court limit or exclude use of evidence which the movant believes to be improper, and is made in advance of the actual presentation of the evidence to the trier of fact, usually prior to trial. The motion asks the court to exclude the evidence unless and until the court is first shown that the material is relevant and proper." *State v. Winston* (1991), 71 Ohio App.3d 154, 158. Thus, because a trial court's decision on a motion in limine is a ruling to exclude or admit evidence, our standard of review on appeal is whether the trial court committed an abuse of discretion that amounted to prejudicial error. *State v. Graham* (1979), 58 Ohio St.2d 350.

{¶ 20} Here, the state filed a motion in limine to exclude evidence of appellant's "manner of driving, physical coordination, conduct, speech and any other physical manifestations indicative of impairment." The state sought to exclude this evidence because it was irrelevant for purposes of proving its case, a "per se" violation of R.C. 4511.19(A)(1)(j)(viii)(II). A "per se" violation is committed where the amount of an illegal substance in an individual's bodily substances exceeds the proscribed statutory amount. *Newark v. Lucas* (1988), 40 Ohio St.3d 100, 103. In that the state merely had to prove that appellant had a concentration of marihuana metabolite in his urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the his urine or had a

concentration of marihuana metabolite in his blood of at least fifty nanograms of marihuana metabolite per milliliter of the his blood, we find that the trial court did not abuse its discretion in granting the state's motion in limine. Appellant's second assignment of error is found not well-taken.

{¶ 21} The judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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