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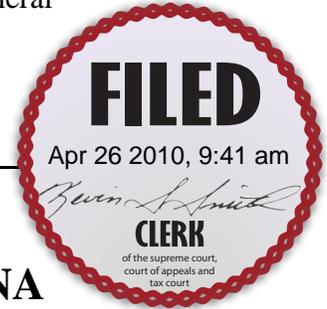
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**IN THE
COURT OF APPEALS OF INDIANA**

NATHAN FOUTCH,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 12A02-0908-CR-768

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0709-FB-252

April 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Nathan Foutch (Foutch), appeals the trial court's denial of his motion to withdraw guilty plea.

We affirm.

ISSUE

Foutch raises one issue on appeal, which we restate as follows: Whether the trial court abused its discretion by denying Foutch's motion to withdraw his guilty plea.

FACTS AND PROCEDURAL HISTORY

On September 20, 2007, deputies with the Clinton County Sherriff's Office received a tip from a confidential informant (CI) that Eddie Dockery (Dockery) had an outstanding warrant for his arrest and was at the residence of Mark Gross (Gross). The CI told investigators that while he was there, he saw Tony Edwards (Edwards) removing pseudoephedrine pills out of their packages and preparing lithium batteries. Based on this information, a search warrant to search Gross's residence was granted.

Once in the residence, deputies arrested Michael Sharber (Sharber), along with Gross, while two other suspects fled the scene. As the deputies cleared the residence, they went outside where they found two vehicles and a camper. Inside one of the vehicles, deputies found a sleeping bag wrapped around a tank that contained anhydrous ammonia. Foutch was found hiding in the camper, along with night vision binoculars.

A search of the porch and garage revealed several items indicating that the premises was used for manufacturing methamphetamines, such as a container of solvent soaked paper

towels; lithium strips; a bucket containing drain cleaner; salt; fuel for camping stoves; filters with a powdery residue; propane tanks; tubing; and a two-liter bottle containing a salt-like substance with a hose coming out of the lid. Inside the house, deputies found other items related to the manufacturing of methamphetamines, including a small jar containing pseudoephedrine pills, some of which were crushed and mixed with lithium batteries. Other items found included a container of chlorinator capsules and a container containing several empty pseudoephedrine blister packs. The Indiana State Police Lab located a small caplet bottle containing pills and two small baggies that contained a powdery substance that later tested positive for methamphetamine. In addition, officers located a jar full of pseudoephedrine pills soaking in a solvent, along with a bottle of acetone and a sawed-off shotgun.

On September 21, 2007, the State filed an Information, charging Foutch with: Count I, dealing in methamphetamine, as a class B felony, Ind. Code § 35-48-4-1(a)(1); Count II, possession of methamphetamine, as a Class C felony, I.C. § 35-48-4-6(a); Count III, possession of chemical reagents or precursors with intent to manufacture a controlled substance, a Class C felony, I.C. § 35-48-4-14.5(e); Count IV, illegal possession of anhydrous ammonia or ammonia solution, a Class C felony, I.C. § 35-48-4-14.5(c); Count V, dealing in a sawed-off shotgun, I.C. § 35-47-5-4.1(a)(6); and Count VI, visiting a common nuisance, a Class D felony, I.C. § 35-48-4-13(b)(2). On October 3, 2007, the State amended Count IV, reducing it to a Class B misdemeanor, I.C. § 35-48-4-13(a), and filed additional Informations, including Count VII, an enhanced sentence for possessing a firearm while

dealing in a controlled substance, I.C. § 35-50-2-13(a)(2)(B). On November 8, 2007, the State filed another Information, alleging Foutch to be an habitual controlled substance offender, I.C. § 35-50-2-10.

On May 28, 2008, Foutch entered into a plea agreement whereby he agreed to plead guilty to Count VIII, which was added at the hearing, possession of a single precursor, a Class D felony, I.C. § 35-48-4-14.5(b), and the State agreed to dismiss all remaining charges. During the hearing on that same day, Foutch and the State stipulated to the sufficiency of the evidence as contained in the affidavit of probable cause:

[TRIAL COURT]: With all that in mind then I ask you formally, how do you plead to Count 8, possession of a single precursor; guilty or not guilty?

[FOUTCH]: Guilty, your honor.

[TRIAL COURT]: Do you agree that on or about September 20, 2007, in Clinton County, Indiana, you did possess more than ten grams of ephedrine, pseudoephedrine or phenylpropanolamine or the salts isomers or salts of isomers of ephedrine, pseudoephedrine, or phenylpropanolamine and combination of these substances contrary to Indiana Law?

[FOUTCH]: Yes

...

[TRIAL COURT]: Tell me what happened please?

[FOUTCH]: On that date, I was in possession of some ephedrine pills. Is that wh – what – what you were asking me?

[TRIAL COURT]: Well, let me ask – [defense counsel], do you stipulate to the Affidavit of Probable Cause for purpose of establishing prima facie case here today?

[DEFENSE COUNSEL]: As it relates to Count 8, Judge.

(Appellant's Exh. A, Transcript of Guilty Plea Hearing, pp. 6-7). As part of the plea agreement, sentencing was left to the discretion of the trial court, with a cap of 18 months. He further agreed to give a sworn, recorded statement relating to the offense for which he was charged, other crimes he committed in the past, and knowledge of crimes committed, whether or not he was involved.

On March 10, 2009, Foutch moved to withdraw his guilty plea, and a hearing was held the next day. During the hearing, Foutch argued that the affidavit of probable cause did not establish a sufficient factual basis for a guilty plea. Specifically, he stated that the report provided by the Indiana State Police Laboratory Division concluded that the 96 round red tablets and 4 oblong white tablets found at the scene and for which he was charged to be in possession of had a total net weight of 41.99 grams. He argued, however, that each one of the red pills found contains 30 milligrams of the precursor, and thus, he would have needed to be in possession of 333.33 pills to reach the 10 gram requirement established by I.C. § 35-48-4-14.5(b). On May 1, 2009, the State filed its response to the defendant's motion to withdraw guilty plea. Four days later, on May 5, 2009, the trial court denied Foutch's motion to withdraw guilty plea and set a sentencing date of June 3, 2009.

On May 29, 2009, Foutch filed a motion to correct error. The State responded on June 15, 2009. That same day, the trial court denied Foutch's motion, and held a hearing. The trial court accepted Foutch's guilty plea and sentenced him to the Indiana Department of Correction for two years, with one year suspended and one year executed, followed by one year on probation.

Foutch now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Foutch contends that the trial court abused its discretion by denying his motion to withdraw his guilty plea. Specifically, he argues that the affidavit for probable cause did not establish a sufficient factual basis for his guilty plea, as he was unaware that he would have needed to be in possession of 333.33 Sudafed pills to equal 10 grams of pseudoephedrine necessary for conviction as required under I.C. § 35-48-4-14.5(b) (“A person who possesses more than ten (10) grams of ephedrine, pseudoephedrine, or phenylpropanolamine, pure or adulterated, commits a Class D felony”). Thus, he argues, withdrawal of the plea agreement was necessary to correct a manifest injustice.

After a guilty plea is entered, but before a sentence is imposed, a defendant may move to withdraw his guilty plea for any fair and just reason unless the State has been substantially prejudiced by its reliance upon the plea. I.C. § 35-35-1-4(b); *Brightman v. State*, 758 N.E.2d 41, 44 (Ind. 2001). The defendant must prove by a preponderance of the evidence that the withdrawal is necessary to correct a manifest injustice. I.C. § 35-35-1-4(b). Absent such a showing, the decision to grant or deny the motion is solely within the trial court’s discretion. *Id.*; *Smallwood v. State*, 773 N.E.2d 259, 264 (Ind. 2002). Therefore, we review the trial court’s denial of a motion to withdraw guilty plea for an abuse of discretion. I.C. § 35-35-1-4(b).

Additionally, a trial court may not accept a guilty plea unless a sufficient factual basis has been established for the plea. I.C. § 35-35-1-3(b). Trial court determinations of an

adequate factual basis are presumed correct, and we review error under an abuse of discretion standard. *Butler v. State*, 658 N.E.2d 72, 77 (Ind. 1995).

An adequate factual basis for the acceptance of a guilty plea may be established in several ways: (1) by the State's presentation of evidence on the elements of the charged offenses; (2) by the defendant's sworn testimony regarding the events underlying the charges; (3) by the defendant's admission of the truth of the allegations in the information read in court; or (4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges.

Madden v. State, 697 N.E.2d 964, 967 (Ind. Ct. App. 1998).

A review of the guilty plea hearing reveals that a sufficient factual basis had been established. First, Foutch satisfied the requirement that he understood the nature of the offense charged and that his plea was an admission of the charges. Foutch admitted his guilt and informed the trial court that he understood his sentence, his rights, what he was waiving, and that he had discussed his plea with his attorney. Additionally, during the hearing, he clearly agreed that his plea was an admission of the charges:

[TRIAL COURT]: With all that in mind then I ask you formally, how do you plead to Count 8, possession of a single precursor; guilty or not guilty?

[FOUTCH]: Guilty, your honor.

[TRIAL COURT]: Do you agree that on or about September 20, 2007, in Clinton County, Indiana, you did possess more than ten grams of ephedrine, pseudoephedrine or phenylpropanolamine or the salts isomers or salts of isomers of ephedrine, pseudoephedrine, or phenylpropanolamine and combination of these substances contrary to Indiana Law?

[FOUTCH]: Yes

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[TRIAL COURT]: Tell me what happened please?

[FOUTCH]: On that date, I was in possession of some ephedrine pills. Is that wh – what – what you were asking me?

[TRIAL COURT]: Well, let me ask – [defense counsel], do you stipulate to the Affidavit of Probable Cause for purpose of establishing prima facie case here today?

[DEFENSE COUNSEL]: As it relates to Count 8, Judge.

(Appellant’s Exh. A, Transcript of Guilty Plea Hearing, pp. 6-7). Thereafter, the trial court found that the “plea [was] freely and voluntarily given.” (Appellant’s Exh. A, Transcript of Guilty Plea Hearing, p.7). Based on the record, there is no indication that the plea was anything but voluntary.

Additionally, to the extent that Foutch argues that when disregarding the weight of the inactive ingredients in the over-the-counter pseudoephedrine pills found at the scene, he was not in possession of more than 10 grams of ephedrine, pseudoephedrine or phenylpropanolamine as required by the statute, he is asking us to reweigh the evidence, which we cannot do, as that was solely for the trier of facts. *Griffith v. State*, 163 Ind.App. 11, 17, 321 N.E.2d 576, 579 (1975).

Finally, Foutch has failed to demonstrate by a preponderance of the evidence that withdrawal of this guilty plea was required to correct a manifest injustice. I.C. § 35-35-1-4(b). Foutch was initially charged with seven counts, ranging from a Class B felony to being charged as an habitual controlled substance offender. Based on his admission, those charges were dismissed in exchange for pleading guilty for possession of a single precursor, a Class D felony. He received a substantial benefit in return for the plea. In addition, the facts

contained in the affidavit of probable cause to which Foutch stipulated as true demonstrated his participation in methamphetamine manufacturing far beyond the scope of what he was charged with. Thus, Foutch has not proven by a preponderance of the evidence that withdrawal was necessary to correct a manifest injustice. I.C. § 35-35-1-4(b).

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion with it denied Foutch's motion to withdraw guilty plea.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.