

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,

Appellant,

v.

JAMES E. BARBER,

Appellee.

Court of Appeals No. A-12459
Trial Court No. 3AN-15-7136 CI

MEMORANDUM OPINION

No. 6491 — July 5, 2017

Appeal from the District Court, Third Judicial District,
Anchorage, Pamela Scott Washington, Judge.

Appearances: James J. Fayette, Assistant District Attorney,
Clinton Campion, District Attorney, Anchorage, and Craig W.
Richards, Attorney General, Juneau, for the Appellant. James
E. Barber, *in propria persona*, Anchorage, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge MANNHEIMER.

On January 25, 2015, the police found two tablets of Suboxone in James
E. Barber's possession. Suboxone is a prescription medicine containing buprenorphine,

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska
Constitution and Administrative Rule 24(d).

and buprenorphine is a schedule VA controlled substance.¹ Based on his possession of the Suboxone tablets, Barber was charged with fifth-degree misconduct involving a controlled substance under former AS 11.71.050(a) (pre-2016 version).

At the time of Barber’s offense, subsection (a)(2)(A) of AS 11.71.050 declared that it was illegal to possess “less than 25 tablets ... containing a schedule IIIA or IVA controlled substance”, while subsection (a)(2)(C) of the same statute declared that it was illegal to possess “less than 50 tablets ... containing a schedule VA controlled substance”. In either case, the offense was a class A misdemeanor.²

Because the tablets in Barber’s possession contained a schedule VA controlled substance, he should have been charged with fifth-degree controlled substance misconduct under subsection (a)(2)(C) of the statute. Barber’s charging document accurately stated that the tablets in Barber’s possession were Suboxone, but the charging document erroneously declared that Barber’s possession of these Suboxone tablets was prohibited by subsection (a)(2)(A) of the statute — the subsection that deals with possession of small amounts of schedule IIIA and schedule IVA controlled substances.

Barber quickly reached a plea agreement with the State. On January 30, 2015 (*i.e.*, five days after the police found the Suboxone tablets), Barber pleaded guilty to the charge of fifth-degree controlled substance misconduct (under the wrong subsection of the statute), and he received an agreed-upon sentence of 50 days to serve. Like the charging document, the district court’s judgment cited the wrong subsection of the fifth-degree controlled substance misconduct statute.

Four months later, in May 2015, Barber filed a petition for post-conviction relief in which he alleged that his plea was void because the charging document and the

¹ See AS 11.71.180(d).

² Former AS 11.71.050(b) (pre-2016 version).

judgement both referred to the wrong subsection of AS 11.71.050(a). The district court agreed with Barber that his plea was void. More specifically, the court ruled that there was no reasonable factual basis for Barber’s guilty plea — because Barber possessed Suboxone, a schedule VA controlled substance, but the charging document charged him with possessing a schedule IIIA or schedule IVA controlled substance.

(See Alaska Criminal Rule 11(f), which forbids a court from entering judgement on a guilty plea “without first being satisfied that there is a reasonable basis for the plea”.)

The record (even construed in the light most favorable to Barber) shows that the district court’s conclusion is wrong. The factual basis of the charge against Barber — his possession of two tablets of Suboxone — is uncontested. It is also uncontested that Barber’s possession of Suboxone constituted the crime of fifth-degree controlled substance misconduct under AS 11.71.050(a).

The fact that Barber’s charging document and the judgement both referred to the wrong subsection of AS 11.71.050(a) does not undermine the factual basis of Barber’s plea. Rather, this discrepancy is a clerical error that can be corrected so long as Barber did not detrimentally rely on the fact that the charging document cited the wrong subsection of the statute.

See Commonwealth v. Young, 695 A.2d 414, 419-420 (Pa. App. 1997) (holding that the defendant was not entitled to post-conviction relief when he pleaded guilty to the wrong subsection of the indecent assault statute, but he conceded that he was guilty under a different subsection of the statute); *McCullen v. State*, 786 So. 2d 1069, 1077-78 (Miss. App. 2001) (holding that the defendant’s guilty plea to a charge of escape was valid, even though the charging document cited the wrong statute, when the charging document stated all the essential facts of the charge of escape); *State v. Bradford*, unpublished, 2017 WL 2297175 at *7 (Ohio App. 2017) (“[W]e are aware of

no authority which states [that] a trial court's reference to an incorrect statutory subsection ... renders a conviction or sentence void. ... Clerical errors, including ones involving a court's incorrect statutory reference in a sentencing entry, can be corrected by a *nunc pro tunc* entry.”).

See also Brown v. State, 12 So. 3d 586, 588-89 (Miss. App. 2009) (holding that the trial court was authorized to amend an indictment that erroneously cited a statutory provision dealing with a different controlled substance, when the charging document correctly identified the defendant's prohibited substance as marijuana, and the defendant admitted under oath that he was growing marijuana).

Here, the district court made no finding that Barber's decision to plead guilty was materially affected by the charging document's reference to the wrong subsection of the statute. Instead, the district court believed that the mistaken statutory reference, standing alone, proved that there was no reasonable basis for Barber's plea, and that his plea was therefore invalid. This was error.

We accordingly REVERSE the judgement of the district court, and we remand this case to the district court for whatever further proceedings may be appropriate in Barber's post-conviction relief litigation.