

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | W. Scott Gwin, P.J. |
| Plaintiff-Appellee | : | Julie A. Edwards, J. |
| | : | Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. CT2008-0038 |
| GREGG A. TABLER | : | |
| | : | |
| Defendant-Appellant | : | <u>OPINION</u> |

CHARACTER OF PROCEEDING: Criminal Appeal From Muskingum County Court Of Common Pleas Case No. 06-CR-0185

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 3, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

D. MICHAEL HADDOX
Prosecuting Attorney
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EMILY STRANG TARBERT
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Edwards, J.

{¶1} Appellant, Gregg A. Tabler, appeals a judgment of the Muskingum County Common Pleas Court overruling his motion to withdraw his guilty plea to felonious assault (R.C. 2903.11(A)(2)), aggravated burglary (R.C. 2911.11(A)(2)), and failure to comply with the order of a police officer (R.C. 2921.331(B)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On June 29, 2006, appellant was indicted by the Muskingum County Grand Jury on four counts: attempted murder (R.C. 2903.02(A)), felonious assault, aggravated burglary and failure to comply with the order of a police officer.

{¶3} Counsel for appellant, Shawn Crawmer, filed a motion on July 13, 2006, for a mental examination of appellant to determine his competency to stand trial. In an affidavit filed August 10, 2006, in support of this motion, counsel represented that appellant had been diagnosed as having an adjustment disorder with mixed disturbance of emotions and conduct, and appellant was dependent on alcohol. The affidavit further stated that appellant was not responsive to questions from his attorney, appeared despondent and denied having any memory of crucial events giving rise to the indictment.

{¶4} The court granted the motion for a competency evaluation. Appellant was evaluated by H.A. Beazel, Psy. D., a clinical psychologist. The report of the psychologist indicated that appellant was able to assist his attorney in his defense and to understand the nature of the proceedings. At a competency hearing held on October 11, 2006, counsel for appellant indicated that appellant was able to communicate with

him at that point in time, and they were making some progress. Tr. (II) 5. The court found appellant competent to stand trial.

{¶5} On October 31, 2006, appellant entered a plea of guilty to the charges of felonious assault, aggravated burglary and failure to comply with the order or direction of a police officer. The state entered a nolle prosequi on the charge of attempted murder. The court sentenced appellant to four years incarceration for felonious assault, three years incarceration for aggravated burglary and one year incarceration for failure to comply with the order of a police officer, to be served consecutively, for an aggregate term of incarceration of eight years.

{¶6} Appellant filed a pro se motion to withdraw his plea on July 17, 2008. Appellant raised two issues in his motion. First, he argued that counsel was ineffective for failing to enter a plea of not guilty by reason of insanity on his behalf and by not providing correct information to him regarding an insanity plea. In an affidavit attached to his motion, appellant stated that he could not remember the events giving rise to the offenses and, after entering the prison system, he had been diagnosed with bipolar disorder and received proper medication for the disorder. Second, appellant argued that his counsel and the prosecutor had a conflict of interest. Appellant argued that his wife called Attorney James Workman at the prosecutor's office when he got in trouble because he was the only attorney she knew. He explained that he could not represent appellant because he worked for the prosecutor, but suggested appellant call Attorney Shawn Crawmer at the Public Defender's office. Appellant argued that his attorney and the prosecutor are friends, and further that the prosecutor's best friend is the alleged

victim's mother's boyfriend. The court overruled the motion on July 18, 2008, without holding an evidentiary hearing. Appellant assigns two errors on appeal:

{¶7} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT ALLOWING APPELLANT TO WITHDRAW HIS GUILTY PLEA WHEN SUCH DENIAL OF APPELLANT'S MOTION RESULTED IN A VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶8} "II. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AS HIS PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY."

I, II

{¶9} In his first assignment of error, appellant argues that trial counsel knew appellant was not receiving medication in the county jail for various physical problems he had, and that the plea was involuntary because he was not properly medicated. Appellant argues that he did not understand the plea until he had been properly treated for his medical conditions and bipolar disorder after entering the prison system following his conviction. In his second assignment of error, appellant argues that his plea was not knowing, voluntary and intelligent because the trial court failed to inform him that he was waiving his right to jury unanimity, his right to participate in the selection of the jury, his right to challenge jurors for cause, his right to remove up to four jurors without cause and his right to have the facts of his case tried solely by the jury.

{¶10} Crim. R. 32.1 governs withdrawal of a guilty plea:

{¶11} "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence

may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶12} The burden to establish the existence of manifest injustice is on the defendant. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, syllabus 1. A motion made pursuant to Crim. R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant’s assertions in support of the motion are matters to be resolved by that court. *Id.* at syllabus 2.

{¶13} Appellant did not raise either argument he raises on appeal in his motion to withdraw his plea in the trial court. While he argued in the trial court that based on his mental state his attorney should have entered a plea of not guilty by reason of insanity on his behalf, he did not argue that his plea was involuntary because he was not receiving proper medication for his physical problems and had not yet been properly diagnosed and treated for bipolar disorder. He also failed to raise in the trial court the claim raised in his second assignment of error regarding the trial court’s failure to inform him of the rights he was waiving concerning jury trial. It is axiomatic that the failure to raise an issue in the trial court waives the right to raise the issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus, *overruled on other grounds* (1988), 49 Ohio St.3d 226.

{¶14} As appellant has waived the issues raised in his assignments of error by failing to raise these issues in his motion to withdraw his plea, the first and second assignments of error are overruled.

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

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

JUDGES

JAE/r0518

