

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JORDAN KENNEDY,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0082

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 16CR446A

BEFORE:

Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:

Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. James Wise, Hartford & Wise, Co., LPA, 91 West Taggart, P.O. Box 85, East Palestine, Ohio 44413 for Appellant Defendant.

Dated: March 18, 2020

Robb, J.

{¶1} Defendant-Appellant Jordan Kennedy appeals from his conviction entered in Mahoning County Common Pleas Court for first-degree felony aggravated robbery in violation of R.C. 2911.01(A)(1)(C), first-degree felony aggravated burglary in violation of R.C. 2911.12(A)(2)(B), and attendant firearm specifications. Two arguments are raised in this appeal. First, Appellant asserts the trial court abused its discretion when it did not journalize the granting of the withdrawal of the *Alford*/guilty plea. Second, Appellant argues the trial court had no authority to sentence him because there was no plea. For the reasons expressed below, the arguments lack merit. The convictions are affirmed.

Statement of the Case

{¶2} On April 11, 2016 Appellant, Kevin Roman and James Kennedy, Jr., entered Anna Jones' home located at 237 East Avondale in Youngstown, Ohio and robbed her at gun point. As a result, a six-count indictment was issued against all three co-conspirators. 6/2/16 Indictment. Appellant, Roman, and Kennedy, Jr. were indicted for aggravated robbery in violation of R.C. 2911.01(A)(1)(C), a first-degree felony and aggravated burglary in R.C. 2911.11(A)(2)(B), a first-degree felony. 6/2/16 Indictment. Both charges had attendant firearm specifications as defined by R.C. 2941.145(A). Appellant was also indicted for having a weapon while under disability in violation of R.C. 2923.13(A)(3)(B), a third-degree felony. The remaining two counts of the indictment were solely against Roman for assaulting Officer Michael Quinn and Officer Jimmy Hughes, Jr., in violation of R.C. 2903.11(A)(2)(D), both first-degree felonies.

{¶3} Appellant entered a not guilty plea and Attorney Maro was appointed to represent him. Thereafter, he requested discovery and waived his right to a speedy trial. In July 2016 Attorney Maro withdrew as counsel and Attorney Lavelle was appointed as counsel.

{¶4} In October 2016 a superseding indictment was issued. Counts one and two of the indictment remained unchanged; Appellant was charged with aggravated robbery in violation of R.C. 2911.01(A)(1)(C), a first-degree felony and aggravated burglary in

violation of R.C. 2911.11(A)(2)(B), a first-degree felony. 10/27/16 Superseding Indictment. The weapons while under disability charge in violation of R.C. 2923.13(A)(3)(B), a third-degree felony, also remained. Counts 4 and 5, which were solely against Kevin Roman, were not in the superseding indictment. However, this indictment added two more counts against Appellant. Count 6 was for burglary in violation of R.C. 2911.12(A)(1)(D), a second-degree felony and Count 7 was for robbery in violation of R.C. 2911.02(A)(2)(B), a second-degree felony. 10/27/16 Superseding Indictment.

{¶15} In March 2017, the state and Appellant reached a plea agreement. Appellant entered an *Alford* plea to aggravated burglary with the attendant firearm specification and aggravated robbery with the attendant firearm specification. The state agreed to dismiss the having weapons while under disability, burglary, and robbery charges; it nolle prosequi counts 3, 6, and 7 of the indictment. 3/21/17 Plea Agreement. The state recommended a prison term, but not a specific term. 3/21/17 Plea Agreement. Following a plea colloquy, the trial court accepted the plea. 3/20/17 Tr. 15-26; 3/21/17 J.E. Sentencing was set for May 11, 2017.

{¶16} On the day of sentencing, Appellant orally moved to withdraw his guilty plea and counsel for Appellant, Attorney Lavelle, moved to withdraw as counsel. 5/11/17 Tr. 3-5. Following advisements by the trial court to Appellant and objections by the state, the trial court granted the motion to withdraw the plea and granted counsel's motion to withdraw. 5/11/17 Tr. 13.

{¶17} Following the hearing, Attorney Lavelle filed a written motion to withdraw as counsel. That motion was granted and Attorney Zena was appointed to represent Appellant. The trial court's granting of the oral motion to withdraw the plea was not reduced to writing and journalized.

{¶18} A pretrial hearing was held on May 30, 2017 and a judgment entry issued after the hearing indicated that plea negotiations were ongoing. 5/31/17 J.E.

{¶19} Over one year later, a sentencing hearing was held. 7/6/18 J.E. During the hearing, it was discussed that during that year, Appellant provided information which helped obtain a conviction for a murder in an unrelated case. 7/2/18 Sentencing Tr. At this hearing, Appellant orally moved to withdraw his withdrawal of the plea. 7/2/18

Sentencing Tr. 11. The trial court granted the request and proceeded to sentencing. In the sentencing judgment entry, the trial court stated:

Defendant previously pled Guilty to the following: Count One, Aggravated Robbery, a violation of ORC §2911.01(A)(1)(C), a Felony of the 1st degree, with Firearm Specification, ORC §2941.145(A) attached to Counts One; Count Two, Aggravated Burglary, a violation of ORC §2911.12(A)(2)(B), a Felony of the 1st degree, with a Firearm Specification, ORC §2941.145(A). The State filed a Nolle Prosequi as to Counts Three, Six, and Seven of the Indictment as it relates to this Defendant.

7/6/18 J.E.

{¶10} The trial court sentenced Appellant to three years for the aggravated robbery and three years for the attendant firearm specification. Pursuant to law, those sentences were mandated to be served consecutive to each other. Appellant also received three years for the aggravated burglary conviction. The aggravated burglary sentence was ordered to be served concurrent to the aggravated robbery sentence. The trial court merged the firearm specification attendant to aggravated burglary with the firearm specification attendant to aggravated robbery. Appellant was also sentenced to a five-year term of post release control. 7/6/18 J.E.

{¶11} It is noted that during the sentencing hearing, discussions occurred explaining the reasoning behind the plea agreement and assurances on judicial release were discussed. Appellant wanted to only receive a three-year sentence. However, due to law, a three-year sentence was not possible with an aggravated robbery and firearm specification conviction. Therefore, the trial court indicated if Appellant did not cause trouble while in prison, the court would grant judicial release at the earliest possible date allowed by law, which would be three and half years. The transcript indicates Appellant understood.

{¶12} Appellant timely appealed his conviction and sentence. 8/3/18 Notice of Appeal.

First Assignment of Error

“The trial court abused its discretion by making an incorrect journal entries.” [sic]

{¶13} Appellant asserts the trial court abused its discretion when it did not journalize its granting of the May 2017 oral motion to withdraw the *Alford*/guilty plea. He also argues the trial court abused its discretion when it did not journalize its decision to grant the motion withdrawing the withdrawal of the guilty plea.

{¶14} The record is clear that the trial court orally granted Appellant's motion to withdraw his *Alford*/guilty plea. However, the trial court did not issue a judgment entry granting the motion to withdraw the *Alford*/guilty plea.

{¶15} It is well-settled that a court of record speaks only through its journal entries. *Wilkshire Communications, Inc. v. Hollinger-Yohe, Ins. Agency, Inc.*, 5th Dist. Tuscarawas No. 2014 AP 06 0024, 2015-Ohio-2371, ¶ 12, citing *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953). Appellate courts have explained that an oral pronouncement of a court is not a final order. *Ruben v. Ruben*, 10th Dist. Franklin No. 12AP-717, 2013-Ohio-3924, ¶ 42, citing *Lamberjack v. Gyde*, 6th Dist. No. 92-OT-034 (Nov.19, 1993) citing *Brackmann Communications, Inc. v. Ritter*, 38 Ohio App.3d 107 (12th Dist.1987). Courts have authority to reconsider nonfinal orders. *Whetzel v. Starkey*, 7th Dist. Belmont No. 99BA42, 2000-Ohio-2621.

{¶16} Since the oral granting of the motion to withdraw was a nonfinal order, the trial court had the authority to reconsider its ruling at any time. The record before this court indicates that less than one month after the hearing on the motion to withdraw, the trial court issued a judgment entry indicating that at the pretrial hearing on May 30, 2017 the trial court was informed that plea negotiations were ongoing. 5/31/17 J.E. This judgment entry is an indication that there was a basis for the trial court to reconsider its oral ruling on the motion to withdraw – that there was a potential for a request to withdraw the withdrawal. Therefore, given the record, it was not an abuse of discretion for the trial court to not journalize the granting of the motion to withdraw the guilty/*Alford* plea.

{¶17} Furthermore, the trial court did not abuse its discretion when it failed to specifically journalize the granting of the withdrawal of the motion to withdraw the *Alford*/guilty plea. At the hearing, the trial court specifically asked if Appellant was withdrawing his withdrawal. He indicated he was. 7/2/18 Tr. 11. The trial court then stated it was proceeding with sentencing and then at length stated it would go along with the recommended sentence. 7/2/18 Tr. 11. This is an indication that the trial court was

granting the withdrawal of the withdrawal. The sentencing judgment entry also does not explicitly state that the court was granting the withdrawal, however, the judgment entry does set forth that Appellant had previously pled guilty. 7/6/18 J.E. This is an indication the trial court granted the withdrawal of the withdrawal.

{¶18} While it would have been cleaner for the trial court to have journalized the granting of the withdrawal and then specifically journalized the granting of the withdrawal of the withdrawal, there is sufficient information in the record for a determination of what was occurring. However, the trial court did not abuse its discretion in failing to journalize the granting of the motion to withdraw the guilty plea and did not abuse its discretion by not specifically referencing the granting of the motion to withdraw the withdrawal when it issued its sentencing judgment entry. This assignment of error lacks merit.

Second Assignment of Error

“The trial court had no authority to sentence the defendant as there was not a plea to the indictment.”

{¶19} Appellant asserts he did not plead guilty and was not found to be guilty prior to the trial court sentencing him. He contends he did not enter a guilty plea and the trial court did not rule on his oral motion to withdraw the withdrawal of the guilty plea. Thus, he contends there was no authority to sentence him.

{¶20} The judgment entry states:

Defendant previously pled Guilty to the following: Count One, Aggravated Robbery, a violation of ORC §2911.01(A)(1)(C), a Felony of the 1st degree, with Firearm Specification, ORC §2941.145(A) attached to Counts One; Count Two, Aggravated Burglary, a violation of ORC §2911.12(A)(2)(B), a Felony of the 1st degree, with a Firearm Specification, ORC §2941.145(A). The State filed a Nolle Prosequi as to Counts Three, Six, and Seven of the Indictment as it relates to this Defendant.

7/6/18 J.E.

{¶21} The record is clear that Appellant did enter a guilty/*Alford* plea to aggravated burglary, aggravated robbery, and attendant firearm specifications. 3/21/17 Plea; 3/21/17 J.E. Appellant did move to withdraw his plea and the trial court did orally grant that

motion. The granting of the withdrawal was not journalized and Appellant later moved to withdraw the withdrawal. The sentencing transcript clearly indicates it was Appellant's intent to withdraw the withdrawal. The trial court indicated it would proceed directly to sentencing and thus, thereby implicitly indicated that the prior guilty/*Alford* plea was still in effect. Accordingly, there was a plea and acceptance of that plea. The trial court had the authority to sentence Appellant.

{¶22} This assignment of error is meritless.

Conclusion

{¶23} Both assignments of error are meritless. The convictions are affirmed.

Donofrio, J., concurs.

Waite, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.