[Cite as *State v. Stevens*, 2022-Ohio-2.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBERT E. STEVENS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0049

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2018 CR 124

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

JUDGMENT:
Affirmed

Atty. Vito Abruzzino, Prosecutor, *Atty. Alec Beech,* Assistant Prosecutor, *Atty. Abbey M. Minamyer*, Assistant Prosecutor, Columbiana County Prosecutor's Office, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Lynn Maro, Maro & Schoenike Co., 7081 West Boulevard, Suite 4, Youngstown, Ohio 44512, for Defendant-Appellant.

Dated:
December 23, 2021

Donofrio, J.

{¶1} Defendant-appellant, Robert E. Stevens, appeals from a Columbiana County Common Pleas Court judgment accepting his guilty plea to tampering with evidence, aggravated robbery, aggravated burglary, and murder. Appellant was sentenced to a total of 20 years to life in prison.

{¶2} A March 9, 2018 police report advised that officers from the Columbiana County Police Department were dispatched to the home of 89-year-old Charles Travis after receiving a call from his daughter, who found him in his home lying on the floor covered in blood, with severe injuries to his face. She reported that her dad told her that $300.00 was missing from his wallet. When officers asked Mr. Travis if he could identify his attackers, he stated that two men came to his door and said they had a package for him and he needed to sign for it. He indicated that when he opened the door, one of the men began attacking and choking him. A subsequent report indicates that officers questioned appellant and he admitted to the robbery. The report also states that appellant admitted to burning the clothes he wore during the crime and other items that could have been used as evidence against him at trial.

{¶3} Appellant was indicted by the Columbiana County Grand Jury for tampering with evidence, aggravated robbery, aggravated burglary, and felonious assault. At a status conference following arraignment, appointed counsel for appellant, who had represented him before, requested leave to file a motion to evaluate appellant's sanity. Appellant stated that he "had a mental health issue all my life." (Mar. 25, 2018 Tr.). Counsel filed the motion for evaluation, a motion for an order allowing him to enter a written plea of not guilty by reason of insanity (NGRI), and a written NGRI plea.

{¶4} The court held a status conference after receiving the sanity evaluation, and after a discussion off of the record, the court stated that no one objected to the report. (Aug. 9, 2018 Tr. at 3). The court noted that appellant's counsel would be withdrawing the NGRI plea based upon the evaluator's conclusion that appellant knew the wrongfulness of his conduct at the time that he committed the crime. (*Id.*). After asking counsel if they

had anything further, the court asked if appellant had any questions. (*Id.* at 5). Appellant asked if the court had read a letter he sent, and the court responded that it does not read such letters, but if appellant wished to discuss something in open court, he could do so. (*Id.).* The court also told appellant that he could speak to his counsel, if necessary. (*Id*.) Appellant stated that in his letter, he pointed out an issue regarding his indictment and he also pointed this out to his counsel. (*Id.).* When the court said, "[o]kay," appellant responded, "[a]nd I don't know what's going on." (*Id.* at 5-6). The court told appellant that if the issue was something that he had discussed with his counsel, counsel could take the matter under advisement, research the issue, and respond. (*Id.* at 6).

{¶5} The next day, the court issued a judgment entry stating that it had received the evaluation report which concluded that appellant did not present with symptoms of a severe mental defect or mental disease. The court noted that the psychiatrist in the report opined that even though appellant was treating with psychiatric medications for mood symptoms and anxiety, those conditions did not interfere with his ability to know the wrongfulness of his acts on the day of the offense. The court granted appellant leave to withdraw the written NGRI plea.

{¶6} On November 1, 2018, the court held a status conference and appellant's counsel asked for a continuance of the trial. (Nov. 1, 2018 Tr. at 2). She stated that she was provided an autopsy report for Mr. Travis, who had died, and she anticipated the filing of a superseding indictment. (*Id.).* The court inquired whether appellant understood that his counsel was moving to continue his trial and whether she had discussed this with him. (*Id.* at 3). He responded yes. (*Id*.). The court found the agreement to be valid and upon rescheduling dates, the court asked if appellant had any questions. (*Id.* at 6). He responded no. (*Id*.).

{¶7} A superseding indictment was filed which added a felony murder charge. At arraignment, appellant's counsel acknowledged receipt of the superseding indictment, waived reading and defects, and entered a not guilty plea on appellant's behalf. (Dec. 6, 2018 Tr. at 2). At the end of the hearing, appellant asked to speak. (*Id*. at 3). The court advised appellant to speak to his counsel and ended the hearing. (*Id*.).

{¶8} Seven days later, the court held another conference. Appellant's counsel reported that appellant was dissatisfied with her representation and wanted her to

withdraw. (Dec. 13, 2018 Tr. at 2-3). She explained that appellant wanted her to file a motion to dismiss the indictment, but she did not see a reason to do so. (*Id.* at 3). The assistant prosecutor added that allowing counsel to withdraw because she finds no merit to appellant's issue would not change anything if the court appointed new counsel because the same issue would arise with new counsel. (*Id*. at 5).

{¶9} When asked about the withdrawal, appellant complained that counsel would not look at the indictment and kept telling him that she had to leave when he tried to show it to her. (Dec. 13, 2018 Tr. at 5-6). He stated that he wanted "it documented that the gold seal is not on there and it's not notarized. And it hasn't been notarized or had a gold seal since I've gotten it." (*Id*. at 6).

{¶10} The court found appellant's reason for counsel to withdraw insufficient. (Dec. 13, 2018 Tr. at 6). Dates were scheduled after discussing defense counsel's pursuit of an expert concerning the autopsy report filed by the State. (*Id.* at 8). The court filed a judgment entry denying the motion to withdraw.

{¶11} On March 14, 2019, the court held another status conference, where it indicated that it had approved appellant's request for expert fees. (Mar. 14, 2019 Tr. at 3). Appellant's counsel moved to continue the trial so the expert could review the case. *Id*. The court asked if appellant understood the request for a trial continuance, if he had discussed it with counsel, and whether he voluntarily, knowingly, and intelligently agreed to it. *(Id*. at 4). Appellant affirmed and agreed. (*Id*. at 4-5).

{¶12} On April 25, 2019, appellant, through counsel, filed a motion to dismiss the indictment, asserting that it was unsworn as required by Crim. R. 3 and 4. On May 24, 2019, the trial court held a status conference and appellant's counsel moved to continue the trial after she was informed that appellant's expert had a medical issue and was delayed in reviewing additional records provided to him. (May 24, 2019 Tr. at 2-3). The court asked appellant if he understood and agreed. *(Id*. at 6). He agreed.

{¶13} On May 29, 2019, the trial court denied appellant's motion to dismiss, and issued another entry continuing the jury trial and noting appellant's voluntary, knowing, and intelligent agreement to the continuance.

{¶14} On August 22, 2019, the trial court held a final pretrial, where it stated that appellant wished to change his plea and he had completed a felony plea agreement form,

written responses to the court, and judicial advice forms. (Aug 22, 2019 Tr. at 2). The assistant prosecutor indicated that appellant would plead guilty to tampering with evidence, aggravated robbery, aggravated burglary, and murder as an unclassified felony. (*Id*. at 3). Appellant's counsel stated that she had reviewed appellant's rights and waiver with him, as well as the evidence in the case, the judicial advice to client form, and appellant's responses to the court. (*Id*. at 4). Counsel stated that appellant wished to change his plea to guilty. (*Id*.).

{¶15} The court inquired of appellant as to his education, which was a GED, and his abilities to read, write, and understand English. (Aug. 22, 2019 Tr. at 4-6). The court asked about appellant's medications, and he stated that he was taking Seroquel as prescribed, but he was not receiving the Xanax, Sinequan, and Elavil that he was prescribed. *(Id*. at 6). Appellant indicated that he was not taking any illegal substances and was not under the influence of alcohol. (*Id*.).

{¶16} The court asked appellant if there was anything, including his medications, which prevented him from understanding the proceedings or what they were discussing at the proceeding. (Aug. 22, 2019 Tr. at 7). He responded, "Not really, no." (*Id*. at 7). The court asked appellant if he understood what was happening since he responded "not really." (*Id*. at 7). After a discussion off the record with his counsel, appellant responded "no." (*Id*.). The court asked again if appellant understood what was occurring at the hearing and appellant responded, "[y]es." *(Id*. at 7). The court asked appellant if he understood that they were discussing the changing of his plea and his entering of a guilty plea as outlined in the felony plea agreement. He responded, "[y]es." (*Id*. at 7). The court asked appellant if he was changing his plea voluntarily, and he responded, "[y]es." (*Id*. at 8). He acknowledged his signature on the plea form and affirmed that he had spoken to his counsel before changing his plea and signing the form. (*Id*.). He indicated that counsel answered his questions about his change of plea. (*Id.).* The court asked appellant if he had any questions for the court about his plea agreement, and he responded "[n]o." (*Id*. at 8-9). The court also asked if appellant understood the judicial advice form and if he had reviewed it with counsel. He responded that he reviewed it with his counsel, his questions were answered, and he had no questions for the court. (*Id*. at 9).

{¶17} The court reviewed the elements of the offenses to which appellant was pleading guilty. (Aug. 22, 2019 Tr. at 10). He responded that he understood the elements, and counsel reviewed them with him, the evidence against him, and answered his questions. (*Id*. at 12). The court informed appellant of the maximum penalties for each charge and appellant responded that he understood. (*Id*. at 13-16).

{¶18} The court then reviewed the constitutional rights that appellant would be entitled to if he proceeded to trial, and informed him that he was waiving those rights by pleading guilty. (Aug. 22, 2019 Tr. at 16). Appellant affirmed that counsel reviewed the rights and their waiver, answered his questions, and he stated he was satisfied with counsel. (*Id.* at 16-18). The court asked if appellant was unclear about anything during this hearing and he responded, "[n]o." (*Id*. at 18). The court emphasized that it was important that appellant understood his rights and the proceedings, and appellant responded that he did. (*Id.* at 19). The court asked if he was proceeding voluntarily and under his own free will, and appellant affirmed. (*Id*.).

{¶19} The court asked appellant for his plea to each of the charges. (Aug. 22, 2019 Tr. at 19-20). Appellant responded, "[g]uilty" to each charge. (*Id*.). The court asked if appellant had any questions, and appellant responded, "[n]o." (*Id*. at 20).

{¶20} The court subsequently held a sentencing hearing. Appellant apologized to Mr. Travis' family, stating that he did not know what he was doing because he was under the influence of drugs. (Nov. 21, 2019 Tr. at 10). He explained that he was addicted to drugs and needed help. (*Id.*). The court asked if appellant had ever sought help on his own, and appellant responded yes, but unsuccessfully. (*Id*.). The court stated that, "[a]nd unfortunately it resulted in a vicious beating of Mr. Travis." (*Id*.). Appellant stated that he did not beat Mr. Travis and he would take a lie detector test. (*Id*.). The court sentenced appellant to twelve months of imprisonment for tampering with evidence, five years of imprisonment for aggravated robbery, five years of imprisonment for aggravated burglary, and fifteen years to life in prison for murder. The court ran the first three sentences concurrently with one another, but consecutive to the murder conviction. The court therefore sentenced appellant to a total of 20 years to life in prison. (*Id*. at 11-12). The felonious assault charge was nolled.

{¶21} On December 19, 2019, appellant filed a notice of appeal asserting four assignments of error. In his first assignment of error, appellant asserts:

> THE TRIAL COURT ERRED IN PERMITTING THE NOT GUILTY BY REASON OF INSANITY PLEA TO BE WITHDRAWN WITHOUT ENSURING THE DEFENDANT WANTED TO WITHDRAW THE PLEA AND THAT THE DEFENDANT WAS DOING SO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY. FOURTEENTH AMENDMENT TO THE UNITED STATE[sic] CONSTITUTION, OHIO CONSTITUTION, ART. I, SECTION 16.

{¶22} Appellant contends that the court did not properly ensure that he understood his rights and the consequences of withdrawing his NGRI plea. He emphasizes that the court went to great lengths to ensure that he understood the entering of his NGRI plea and every trial continuance, and the court filed judgment entries as to each of those proceedings. Appellant emphasizes, however, that the court did not ensure that he understood the withdrawal of his NGRI plea and filed no entry about this withdrawal. He contends that this violates the Fourteenth Amendment and the Ohio Constitution.

{¶23} We first note that a defendant need not formally withdraw a NGRI plea. Rather, the defense is withdrawn "by entering a guilty or no-contest plea, by failing to pursue the defense, or by pursuing a new defense at trial." *State v. Martin*, 3rd Dist. Hancock, No. 5-15-28, 2016-Ohio-989, ¶ 38, citing e.g., *State v. Harris*, Ohio St.3d 211, 2015–Ohio–166, ¶ 18; *State v. Caudill*, 48 Ohio St.2d 342, 342–43 (1976); *State v. Langenkamp*, 3d Dist. Shelby Nos. 17–07–08 and 1708–09, 2008–Ohio–1136, ¶¶ 28–29; *State v. McQueeney*, 148 Ohio App.3d 606, 2002–Ohio–3731, ¶ 34. In *McQueeney*, the Twelfth District held that a trial court did not err by accepting a defendant's valid guilty plea even though his NGRI plea had not been formally withdrawn. *Id.* That court found that a defendant's valid guilty plea is an "implied admission of sanity," and held that "when a defendant enters a plea of not guilty by reason of insanity and then later enters a plea of guilty without formally withdrawing the not guilty by reason of insanity plea, the defendant has waived any argument pertaining to the insanity defense." *Id*. The court

explained that a guilty plea bars any defense to the crime and a defendant acknowledges full responsibility for the crime and all legal consequences of guilt by pleading guilty. *Id.* at ¶ 33 (citations omitted).

{¶24} Here, appellant ultimately entered a guilty plea to tampering with evidence, aggravated robbery, aggravated burglary, and murder. (Aug. 22, 2019 Tr. at 19-20). His guilty plea thus constituted a withdrawal of his NGRI plea and an implied admission of sanity which barred him from raising further issues about his insanity defense. Moreover, the trial court engaged appellant in a thorough plea colloquy before accepting his guilty plea, ensuring that he understood his rights and the waiver of rights upon pleading guilty. The court stopped the colloquy hearing when appellant responded, "Not really, no," when asked if there was anything, including his medications, which prevented him from understanding the proceedings or the discussions at the proceeding. (Aug. 22, 2019 Tr. at 7). The court had appellant confer with his counsel off of the record, and inquired when they returned to the record whether appellant understood the hearing and his entering of a guilty plea. (*Id*.). Appellant responded, "[y]es." (*Id.).* The court asked appellant if he had any questions to ask the court about his plea agreement, and he responded, "[n]o." (*Id*. at 8-9). The court also asked about appellant's understanding and review of the judicial advice form, and he responded that he reviewed it with his counsel, his questions were answered, and he had no questions for the court. (*Id*. at 9).

{¶25} Even if we do not consider the waiver of his NGRI plea and the admission of sanity by appellant entering a guilty plea, and the trial court's careful plea colloquy, appellant's assignment of error lacks merit. Appellant cites *State v. Tenance*, 121 Ohio App.3d 702, 715, 700 N.E.2d 899 (6th Dist. 1997), S*tate v. Phillips*, 3rd Dist. Van Wert No. 15-12-02, 2012-Ohio-5950, and *State v. Smith*, 3 Ohio App.3d 115, 120, 444 N.E.2d 85 (8th Dist. 1981), for support that a trial court has, or should have, an affirmative duty to inquire of a defendant regarding his withdrawal of a NGRI plea.

{¶26} In *State v. Tenance*, 121 Ohio App.3d 702, 715, 700 N.E.2d 899 (6th Dist. 1997), the appellate court held that once a defendant is found competent to stand trial, it is the defendant's choice, not that of his counsel, as to the plea to enter, including a NGRI plea or its withdrawal. Tenance's counsel had moved to withdraw his previously entered NGRI plea despite Tenance's desire to proceed with the NGRI plea. The trial court

accepted the withdrawal and proceeded to trial. The appellate court reversed, finding that it was not counsel's right, but Tenance's right to choose the plea to enter, and he had indicated numerous times through written pro se motions and at trial that he wished to proceed with his NGRI plea. He had also asked his counsel to withdraw from the case because of a breakdown in communications relating to counsel's unwillingness to explore the NGRI plea. The appellate court held that an attorney may make tactical decisions as to the plea to enter "only when a client does not choose to make the decision or does not object on the record." *Id.* at 712.

{¶27} In *State v. Phillips*, 3rd Dist. Van Wert No. 15-12-02, 2012-Ohio-5950, the appellant alleged that his guilty plea was invalid because the trial court failed to inform him about an insanity defense. The appellate court held that Ohio law did not require trial courts to inform defendants of available defenses when accepting guilty pleas. *Id*. at ¶ 32. The appellate court also noted that the trial court cursorily discussed the insanity defense with Phillips during his plea colloquy. *Id.* at ¶ 33. Appellant here acknowledges the outcome in that case, but asserts that unlike the trial court there, the trial court in his case did not discuss withdrawing his NGRI plea at all or its implications, even though it carefully discussed the entry of the NGRI plea.

{¶28} Appellant also cites *State v. Smith*, 3 Ohio App.3d 115, 120, 444 N.E.2d 85 (8th Dist. 1981), where the appellate court held that, "in the absence of any constitutional provision, statute, or court rule restricting defense counsel's authority to withdraw a plea of not guilty by reason of insanity, the trial court acts properly in accepting the withdrawal without personally discussing the matter with the defendant himself, at least when the record discloses no dissension from that decision by the defendant."

{¶29} We agree that a trial court must protect a defendant's rights and proceed more diligently when a defendant presents with mental health issues. However, we find that Ohio law does not require the trial court to engage a defendant in a colloquy before the withdrawal of the NGRI plea. Further, appellant did not object or otherwise oppose the withdrawal of his NGRI defense and there was no indication on the record that appellant wished to proceed on that defense. Appellant was given numerous opportunities to speak, object, and otherwise inform the court that he wanted to go forward with his NGRI plea, but he did not do so.

{¶30} At the August 9, 2018 status conference, the court reviewed the sanity evaluation and stated that appellant's counsel would be withdrawing the NGRI plea as a result. (Aug. 9, 2018 Tr. at 3). The trial court asked if appellant had any questions. (Aug. 9, 2018 Tr. at 5). Rather than object to the withdrawal of his NGRI plea, appellant asked about the letter that he had sent to the court regarding alleged deficiencies in his indictment. (Aug. 9, 2018 Tr. at 5). At the November 1, 2018 status conference, the court asked appellant if he had any objections to a continuance of his trial and asked appellant if he had any other questions. (Nov. 1, 2018 Tr. at 4, 6). Appellant responded no. (Nov. 1, 2018 Tr. at 4, 6). At the arraignment on the superseding indictment, appellant's counsel entered only a not guilty plea on appellant's behalf and did not raise a NGRI defense. (Dec. 6, 2018 Tr. at 2). While appellant asked if he could speak near the end of the arraignment, the court told him that he needed to speak with his counsel. (Dec. 6, 2018 Tr. at 3).

{¶31} The following week, appellant had another opportunity to ask about the NGRI plea. Appellant's counsel requested permission to withdraw from the case because appellant was dissatisfied with her representation and there was a breakdown in communications. (Dec. 13, 2018 Tr. at 3-4). Appellant did not indicate that the source of his dissatisfaction with counsel concerned the withdrawal of his NGRI plea. In fact, he did not mention his NGRI plea at all. Rather, he stated that he was dissatisfied with counsel because she failed to file a motion to dismiss the indictment because it lacked a gold seal and notarization. (Dec. 13, 2018 Tr. at 3-7). After denying the motion to withdraw, the court asked appellant if he had any questions, and appellant said no. (Dec. 13, 2018 Tr. at 14).

{¶32} The March 14, 2019 status conference presented yet another opportunity for appellant. (Dec. 13, 2018 Tr. at 2-9). The court asked him if he agreed with the continuance of his trial and asked if he had any questions. (Dec. 13, 2018 Tr. at 5, 9). Appellant responded no. (Dec. 13, 2018 Tr. at 5-9). The court asked appellant if he had any questions at the April 18, 2019 status conference, and he responded no. (Apr. 18, 2019 Tr. at 3). The court asked appellant if he had questions at the May 24, 2019 status conference and again, appellant did not mention the NGRI plea or withdrawal. Rather,

he informed the court that his counsel did file the motion to dismiss the indictment, but it should have been a motion to "squash" the indictment. (May 24, 2019 Tr. at 6-7). *Id.*

{¶33} In light of appellant's lack of opposition to the withdrawal of his NGRI plea on the record and his failure to raise the issue during various proceedings, the Court finds that appellant's case is distinguishable from the cases that he cites as support. *Tenance* had a defendant who repeatedly objected to the withdrawal of his NGRI plea. *Stevens* involved the court upholding the withdrawal of a NGRI plea when there was no dissension by the defendant on the record. And the court in *Phillips* noted that while the trial court cursorily discussed the insanity defense with the defendant, Ohio law did not require a trial court to inform a defendant of available defenses when accepting his guilty plea.

{¶34} For these reasons, we find that appellant's first assignment of error is without merit and is overruled.

{¶35} Appellant's second assignment of error asserts:

> A PLEA IS NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED WHEN A TRIAL COURT FAILS TO ENSURE A DEFENDANT WITH SERIOUS MENTAL HEALTH PROBLEMS IS AWARE THE PLEA RESULTS IN A WAIVER OF ANY NGRI DEFENSE, RENDERING THE PLEA INVOLUNTARY IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT[sic} TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION, ART I. SECTION 16.

{¶36} Appellant asserts that the trial court failed to establish on the record that he understood that he was waiving his right to present a NGRI plea by pleading guilty. He notes that a trial court must strictly comply with Crim. R. 11(C) before accepting a guilty plea. He cites our holding in *State v. Mangus*, 7th Dist. Columbiana No. 07 CO 36, 2008-Ohio-6210, ¶ 3, that "[i]n Ohio, a guilty plea contains within it an implied admission of sanity." He also cites to *State v. Geho*, 2nd Dist. Champaign No. 2002 CA 32, 2003-Ohio-5727, where the court found that the record of the defendant's plea hearing did not cause concern about the validity of his guilty plea even though he claimed that he was not mentally stable and did not understand the proceedings. Appellant asserts that the

trial court in *Geho* took measures that the court in his case did not, in order to ensure that the guilty plea was voluntarily, intelligently, and knowingly made. He contends that sufficient facts exist to overcome the presumption of sanity in *Mangus* because he stated on the record that he was not receiving all of his mental health medications at the jail, and he answered "not really" when the court asked if anything interfered with his ability to understand what was occurring at the plea hearing. He also cites his willingness to take a lie detector test at his sentencing.

{¶37} This assignment of error is without merit. Crim. R. 11 does not require a court to engage in a colloquy for the withdrawal of a NGRI plea. As explained above, there is no rule or statute requiring a court to inform a defendant of a NGRI plea defense or of its withdrawal. *State v. Harris*, 142 Ohio St.3d 211, 215, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 17. Further, appellant did not offer a NGRI plea to the superseding indictment, only a not guilty plea. He then ultimately entered a guilty plea. When a defendant enters a guilty plea, he effectively withdraws a NGRI defense and waives issues relating to the NGRI defense. *State v. Martin*, 3rd Dist. Hancock, No. 5-15-28, 2016-Ohio-989, ¶ 38.

{¶38} Moreover, appellant's "not really" response to the court's question as to whether anything prevented him from understanding his guilty plea was clarified and remedied by the court. The transcript reveals the following discussion between the court and appellant at the August 22, 2019 plea colloquy:

> THE COURT: All right. Mr. Stevens, are you currently taking any medication or are you under the care of a physician for any medical issues here today?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Are you taking those medications as prescribed?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you know the name of that medication?

THE DEFENDANT: Seroquel. I'm supposed to being[sic] taking Xanax, and Sinequan, and Elavil also.

THE COURT: Okay. Are you taking those medications as prescribed?

THE DEFENDANT: Not my Xanax, and Sinequan, and Elavil. I'm taking the Seroquel. They don't allow my other prescriptions at the jail.

THE COURT: All right. Thank you. Are you under the care of a physician for any other medical issues?

THE DEFENDANT: Yeah. I got hiatal hernia. I got a groin hernia. I got asthma, real bad. COPD.

THE COURT: All right. Are you currently under the influence of alcohol, any drug of abuse, or any sort of a controlled substance?

THE DEFENDANT: No.

THE COURT: All right. Mr. Stevens, is there anything that prevents you from understanding what we're doing here today or what we're talking about here today including any of the medications that you told me about?

THE DEFENDANT: Not really, no.

THE COURT: Well, when you say "not really," can you - - - you understand so far what we're doing here today; correct?

(Ms. Gorby and Mr. Weeds confer with their client off record).

THE DEFENDANT: No.

> THE COURT: All right. I want to make sure, Mr. Stevens that I understand. Okay. So you understand what we're doing here today and what we're talking about here today; correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And we're talking about is you changing a plea and entering a plea of guilty as outlined in the felony plea agreement; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Is that what you wish to do?
>
> THE DEFENDANT: Yes.

(Aug. 22, 2019 Tr. at 6-8). The court then asked appellant if he had reviewed the felony plea agreement, the judicial advice form, and his responses to the court with counsel and if all of his questions about the agreement had been answered. (Aug. 22, 2019 Tr. at 8-10). He responded yes as to each. (*Id*.). The court asked appellant if he had questions about these documents for the court, and he responded no. (*Id*). He acknowledged his signature on each of the documents and stated that he signed them voluntarily after counsel answered his questions. *(Id*). The court asked appellant if he had any further questions and he indicated that he did not. (*Id.* at 10).

{¶39} The court then reviewed each and every element of the offenses to which appellant was pleading guilty and their maximum penalties. (Aug. 22, 2019 Tr. at 10-16). The court asked appellant if he understood these items, whether he had reviewed them and the evidence against him with counsel, and whether counsel answered any questions he had about the elements and penalties. (Aug. 22, 2019 Tr. at 10-16). Appellant responded "yes" to these questions. (*Id.* at 12-14). The court informed appellant of the constitutional and non-constitutional rights that he possessed and the waiver of those rights upon pleading guilty. *(Id*. at 16-19). The court asked appellant if his counsel explained the rights and waiver upon pleading guilty, whether he was satisfied with

counsel, and whether he understood each of the rights and the waiver. (*Id.*). He responded "yes" to each question. (*Id.*).

{¶40} The court then specifically asked appellant if there was anything presented that was unclear to him and whether he had any questions, and appellant responded "no." (Aug. 22, 2019 Tr. at 18). The following discussion occurred on the record:

> THE COURT: Again, Mr. Stevens, I want to make sure that you understand what we're doing here today and what we're talking about here today.
>
> THE DEFENDANT: Yes.
>
> THE COURT: In all respects, you're proceeding today voluntarily and of your own free will?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Now, is everything you told me here so far the truth?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Thank you. Mr. Stevens, I previously read to you the legal elements of Count One, Count Two, Count Three, and Count Five. You told me you understood those legal elements. Is that still true?
>
> THE DEFENDANT: Yes.

(Aug. 22, 2019 Tr. at 19). The court asked appellant for his plea as to Counts One, Two, Three and Five and appellant responded "guilty" as to each. (*Id*. at 19-20).

{¶41} The court's thorough plea colloquy and appellant's repeated affirmances that he understood the proceedings and the consequences of pleading guilty resolve any doubt as to whether the lack of medications impacted his capacity to plead and to understand the consequences of pleading guilty. "[T]he fact that a defendant has a mental illness or was taking psychotropic medication or not getting all of his prescribed medications when he enters a guilty plea does not establish that the plea was invalid or

that a defendant lacks mental capacity to enter a plea or that the trial court otherwise erred in accepting the defendant's guilty plea." *State v. Carty*, 2018-Ohio-2739, 116 N.E.3d 862 (8th Dist), citing *State v. McClendon*, 8th Dist. Cuyahoga No. 103202, 2016-Ohio-2630, ¶ 16 (citations omitted). A trial court may determine that a defendant understands his plea "by considering the surrounding circumstances such as the dialogue between the court and the defendant and the defendant's demeanor." *Carty* at ¶ 22, citing *State v. McDowell*, 8th Dist. Cuyahoga No. 70799, 1997 WL 15254 (Jan. 16, 1997)(citing *State v. Swift*, 86 Ohio App.3d 407, 411, 621 N.E.2d 513 (11th Dist.1993). The circumstances surrounding appellant's guilty plea in this case establish that he understood the waiver of his rights upon entering a guilty plea, and that he knowingly, voluntarily, and intelligently entered a guilty plea. Appellant did not assert his innocence and the trial court made sure that he understood that he was waiving his right to present evidence at trial on his behalf and to challenge evidence presented at trial against him. (Aug. 22, 2019 Tr. at 16-19).

{¶42} For these reasons, we find that appellant's second assignment of error lacks merit and is overruled.

{¶43} In his third assignment of error, appellant asserts:

> THE COURT ERRED WHEN IT FAILED TO INFORM THE DEFENDANT THAT HE HAD THE RIGHT TO HAVE AN INDEPENDENT PSYCHIATRIC EVALUATION PERFORMED AT THE PUBLIC EXPENSE R.C. § 2945.371; FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, OHIO CONST. ART.I, SECTION 16.

{¶44} Appellant contends that the trial court did not follow proper procedure under R.C. 2945.371(B) when it unilaterally ordered the Forensic Psychiatry Center to prepare his sanity evaluation. He asserts that the trial court should have informed him that he could have an independent evaluation.

{¶45} The Court finds no merit to this assertion. R.C. 2945.371 provides in relevant part that:

2945.371 Evaluations of mental condition; access to report

(A) If the issue of a defendant's competence to stand trial is raised or if a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant's present mental condition or, in the case of a plea of not guilty by reason of insanity, of the defendant's mental condition at the time of the offense charged. An examiner shall conduct the evaluation and the evaluation may be conducted through electronic means.

(B) If the court orders more than one evaluation under division (A) of this section, the prosecutor and the defendant may recommend to the court an examiner whom each prefers to perform one of the evaluations. If a defendant enters a plea of not guilty by reason of insanity and if the court does not designate an examiner recommended by the defendant, the court shall inform the defendant that the defendant may have independent expert evaluation and that, if the defendant is unable to obtain independent expert evaluation, it will be obtained for the defendant at public expense if the defendant is indigent.

R.C. 2945.371(A), (B).

{¶46} During the arraignment on the superseding indictment, appellant did not raise a NGRI plea and only a not guilty plea was entered on his behalf. Further, appellant had one court-ordered evaluation which found that appellant knew the wrongfulness of his actions and behavior during the time of the crime. Moreover, appellant ultimately entered a valid guilty plea to the charges. Thus, it appears that appellant has waived the issue relating to a sanity evaluation or it is otherwise moot.

{¶47} Even if addressed, appellant misinterprets R.C. 2945.371(B). The plain language of the statute states that the trial court shall inform the defendant that he may have an independent expert evaluation only ***if*** the court orders more than one sanity evaluation. In *State v. Hix*, 38 Ohio St.3d 129, 527 N.E.2d 784 (1988), syllabus, the Ohio Supreme Court held, under a prior version of the statute, that a defendant has no right to

an independent psychiatric examiner "unless the trial court has ordered more than one psychiatric evaluation and the trial court has refused to appoint an examiner recommended by the defendant." More than one examination was not ordered in this case. Further, the court did not need to inform appellant of the right to have an independent psychiatric evaluation or the right to have such an evaluation performed at public expense because more than one evaluation was not ordered by the court or requested by appellant. Moreover, there is no constitutional right for a defendant to choose his own evaluator. *State v. Esparza*, 39 Ohio St.3d 8, 529 N.E.2d 192 (1988). In addition, R.C. 2945.371(A) does not require the court to order even one sanity evaluation as the language is permissive, not mandatory.

{¶48} For these reasons, we find that appellant's third assignment of error lacks merit and is overruled.

{¶49} In his last assignment of error, appellant asserts:

> THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO REMOVE COURT APPOINTED COUNSEL WHEN BOTH APPELLANT AND TRIAL COUNSEL DISCLOSED A BREAKDOWN OF THE ATTORNEY-CLIENT RELATIONSHIP RESULTING IN A DENIAL OF THE RIGHTS AND LIBERTIES SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 AND 16 OF THE OHIO CONSTITUTION.

{¶50} Appellant contends that he had a right to have counsel removed when she was not functioning as an effective advocate in violation of *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) and *State v. Jones*, 91 Ohio St.3d 335, 342, 2001-Ohio-57, 744 N.E.2d 1163. He asserts that his request for new counsel was reasonable as both he and his counsel told the court that counsel wished to be removed because communications had broken down between them. He also submits that the trial court erred when it did not state that it had considered the factors outlined by the Ohio Supreme Court in *State v. Jones, supra,* in determining whether to substitute counsel.

{¶51} The Sixth Amendment of the United States Constitution and Section 10, Article I of the Ohio Constitution provide that a criminal defendant has the right to counsel. *State v. Milligan*, 40 Ohio St.3d 341, 533 N.E.2d 724 (1988), paragraph one of the syllabus. "Under the federal and state constitutions, the defendant is simply entitled to the effective assistance of legal counsel." *State v. Stewart*, 2018-Ohio-684, 101 N.E.3d 688 (8th Dist. Cuyahoga), quoting *State v. Hudson*, 8th Dist. Cuyahoga No. 98967, 2013-Ohio-1992, 2013 WL 2150723, ¶ 7.

{¶52} We held in *State v. Brown*, 2018-Ohio-253, 104 N.E.3d 214, ¶ 17 (7th Dist.), that the decision to remove court-appointed counsel and allow substitution of new counsel is left to the discretion of the trial court. This Court's standard of review is thus an abuse of discretion, which implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court. *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980). In order for the trial court to grant a motion to remove appointed counsel, "the defendant must show a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." *Brown* at ¶ 19, quoting *State v. Henness*, 79 Ohio St.3d 53, 65, 679 N.E.2d 686 (quoting *State v. Coleman*, 37 Ohio St.3d 286, 525 N.E.2d 792 (1988).

{¶53} In *Jones*, *supra*, the case cited by appellant, the trial court denied Jones's request to substitute appointed counsel for his chosen counsel after trial had begun in his capital murder prosecution. The court offered to allow chosen counsel to assist appointed counsel, but denied chosen counsel's request for a four-month continuance of the trial and his request to be lead counsel since he was not death-penalty certified. *Id*. at 341. Chosen counsel refused to proceed and Jones could not use his services. *Id*. at 342. Jones asserted that this violated his Sixth Amendment right to counsel. *Id.*

{¶54} The Ohio Supreme Court found no abuse of discretion in denying the motion to substitute appointed counsel with the defendant's chosen counsel. J*ones,* at 342. The Court held that " 'while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate * * * rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.,* quoting *Wheat*, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140, 148. The Court held that a defendant

has only a "*presumptive*" right to retain his own chosen counsel, and it identified factors for an appellate court to consider when determining whether a trial court erred in denying a defendant's motion to substitute counsel. Those factors include: " ' the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict that exists between the attorney and the defendant was so great that it results in a total lack of communication preventing an adequate defense.' " *Jones*, 2001-Ohio-57 at 342. The Court also held that appellate courts should " 'balance * * * the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice.' " *Id.* The Court reviewed the trial court's inquiry of the defendant and his appointed counsel and found no error in the court's denial of the motion to substitute counsel.

{¶55} Similarly here, at the hearing on the motion to withdraw, appellant's counsel explained that appellant was dissatisfied with her representation because he wanted her to file a motion to dismiss the superseding indictment as it was not notarized and lacked a gold seal. (Dec. 13, 2018 Tr. at 3-5). Counsel stated that she reviewed the superseding indictment and found no issue upon which to file the motion. (*Id*. at 3). Appellant explained to the court that he tried to show his counsel the indictment, but she would not look at it and told him that she had no time to review it. (*Id*. at 5).

{¶56} The trial court held a hearing on the motion, adequately inquired into appellant's reason for wanting counsel removed, and found it inadequate. The trial court did not abuse its discretion by finding that this reason was not a conflict " 'so great that it result[ed] in a total lack of communication preventing an adequate defense.' " *Jones,* 2001-Ohio-57 at 342. Further, the court did not jeopardize appellant's right to counsel as it also determined that despite statements of a breakdown in communications, nothing showed that appellant's counsel, an experienced attorney for almost 20 years, was unable or unwilling to represent him. (Dec. 13, 2018 Tr. at 7). In addition, appellant's counsel did comply with his request and filed a motion to dismiss the superseding indictment. Moreover, at his change of plea hearing, appellant affirmed to the court that he was satisfied with counsel's representation, and she had reviewed with him his constitutional rights and the waiving of those rights upon entering a guilty plea. (Aug. 22, 2019 Tr. at 18).

{¶57} For these reasons, we find that appellant's fourth assignment of error lacks merit and is overruled.

{¶58} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, 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 Columbiana County, Ohio, is affirmed. Costs to be 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.