

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 02CA2654
 :
 v. :
 :
 WESLEY C. VINCENT, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. : RELEASED 1-21-03

APPEARANCES:

APPELLANT PRO SE¹: Wesley C. Vincent A237-368
C.R.C. P.O. Box 300
Orient, Ohio 43146-0300

COUNSEL FOR APPELLEE: Scott W. Nusbaum
Ross County Prosecuting Attorney

Matthew S. Schmidt
Assistant Prosecuting Attorney
72 North Paint Street
Chillicothe, Ohio 45601

EVANS, P.J.

{¶1} Defendant-Appellant Wesley C. Vincent appeals the judgment of the Ross County Court of Common Pleas, which denied his motion to withdraw his guilty pleas. Appellant asserts that the trial court should have held a hearing, and ruled, on a pro se motion for leave

¹ Appellant was represented by counsel below.

to file a delayed motion for new trial and a pro se motion for new trial.

{¶2} For the reasons that follow, we disagree with appellant and affirm the judgment of the trial court.

The Proceedings Below

{¶3} In March 1990, Defendant-Appellant Wesley C. Vincent shot and killed his wife. Eventually, appellant pled guilty to the following: (1) aggravated murder with a firearm specification, a violation of R.C. 2903.01; (2) attempted aggravated burglary, a violation of R.C. 2911.11 and 2923.02; (3) failure to comply with the order or signal of a police officer, a violation of R.C. 2921.331; and, (4) two counts of felonious assault with a firearm specification, violations of R.C. 2903.11.² The trial court imposed a life sentence upon appellant for the aggravated murder offense. Prison sentences were also imposed for the other offenses, some to be served consecutively and others concurrently.

{¶4} In August 2001, appellant filed a pro se motion for leave to file a delayed motion for new trial and a motion for new trial pursuant to Crim.R. 33(B). Appellant asserted the existence of new evidence which he was "unavoidably prevented from discovering *** within one hundred and twenty days from the day the court sentenced Defendant." Attached to his motion were the affidavits of Randy

² These citations are to the statutes in effect at the time of the offense.

Detty and David Cook, which were obtained in 1996 and 1997, respectively, and allegedly contained exculpatory evidence.

{¶5} Subsequently, the state filed a motion contra appellant's motions. The state asserted that appellant's motions were entirely without merit because the two affidavits presented to the court were from witnesses who were disclosed by the state during the original trial court proceedings.

{¶6} Shortly thereafter, counsel for appellant filed a notice of appearance. Counsel for appellant filed a motion to withdraw appellant's initial pro se motions filed pursuant to Crim.R. 33(B). Counsel asserted that, in lieu of the pro se motion, a motion to withdraw guilty pleas would be filed pursuant to Crim.R. 32.1, based on his belief that Crim.R. 32.1 provided a better mechanism to resolve the issues raised by appellant's initial motion.

{¶7} The trial court granted the motion to withdraw appellant's initial pro se motion.

{¶8} Subsequently, appellant filed another pro se motion asking the trial court to reinstate his initial pro se motions seeking a new trial.

{¶9} Consequently, the trial court held a status conference on the record with counsel for both parties and appellant present. Counsel for appellant informed the court of his intention to file a motion to withdraw appellant's guilty pleas in lieu of the pro se motion for a new trial. Counsel for appellant also indicated that

appellant's motion seeking the reinstatement of his pro se motion for a new trial was filed because of a difference of opinion between appellant and counsel regarding the proper mechanism to present the evidence to the court. However, counsel for appellant indicated to the trial court that the differences had been resolved and that he would proceed with the motion to withdraw appellant's guilty pleas. Appellant made no statement or objection at the hearing.

{¶10} The motion for leave to withdraw appellant's guilty pleas was filed with the trial court asserting the same evidentiary grounds raised in appellant's initial pro se motion. The state filed its motion contra shortly thereafter.

{¶11} On March 24, 2002, the trial court entered its judgment denying appellant's motion to withdraw his guilty pleas, finding that no manifest injustice had occurred.

The Appeal

I. Assignments of Error

{¶12} Appellant timely filed his notice of appeal and presents the following assignments of error for our review.

{¶13} First Assignment of Error: "The trial court erred and abused it's [sic] discretion in accepting a motion from counsel to withdraw guilty plea after pro se defendant stated on record that he wanted motion [sic] for new trial to be ruled on."

{¶14} Second Assignment of Error: "The trial court erred and abused it's [sic] discretion in not hearing defendant's motion for

new trial and motion for leave to file a delayed motion for new trial. It appears from the record that there was no hearing held upon motion's [sic]."

{¶15} At the outset, we note that appellant is not arguing to this Court that the trial court's judgment denying the motion to withdraw his guilty pleas was somehow erroneous. In fact he essentially concedes that the trial court's decision was appropriate. Since appellant's arguments concern only the pro se motions for a new trial, we address appellant's assignments of error conjointly.

II. Motion for New Trial

{¶16} In his assignments of error, appellant asserts that he discovered new evidence that warrants granting him a new trial pursuant to Crim.R. 33. However, for reasons that follow, we need not address the evidentiary basis of appellant's motion.

{¶17} First, we note that motions not explicitly decided when a case is concluded are presumed to have been overruled. See *In re Lewis* (Apr. 30, 1997), Athens App. Nos. 96CA1760 & 96CA1763; *State v. Rozell* (June 20, 1996), Pickaway App. No. 95CA17; *State v. Kennedy* (Oct. 2, 1995), Athens App. No. 95CA1657. Accordingly, appellant's pro se motions were implicitly overruled.

{¶18} Second, "[i]n using the term 'new trial,' Crim.R. 33 implicitly applies only to cases in which a trial has occurred. A defendant waives his right to a trial by pleading guilty. He further waives all appealable errors that may have occurred at trial, unless

such errors prevented the defendant from voluntarily entering his plea." *State v. Carter* (Feb. 25, 2000), Pike App. No. 99CA636, citing *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph two of the syllabus (citing Crim.R. 11 and *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709).

{¶19} Appellant pled guilty to aggravated murder, aggravated robbery, failure to comply with the signal or order of a police officer, and two counts of felonious assault. The record contains no evidence, nor does appellant argue, that his plea was entered into involuntarily. Therefore, appellant waived his right to a trial and any appealable errors that may have occurred at trial.

{¶20} The proper mechanism through which appellant could request a trial after pleading guilty is a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. See *Carter*, supra. This is the precise motion that appellant's counsel filed on appellant's behalf. This motion was denied and appellant does not challenge the propriety of that decision by the trial court.

{¶21} In short, appellant cannot be entitled to a new trial because he never had a trial. Consequently, the trial court did not err by implicitly denying appellant's motion without holding a hearing on it.

{¶22} Additionally, we note that appellant asserts that he informed the court, on the record, that he wanted the trial court to rule on his motions. As we have already noted, appellant's motions

were procedurally flawed, and any such ruling by the trial court was unnecessary.

Conclusion

{¶23} Based on the foregoing, it is evident that the trial court did not err or abuse its discretion by proceeding as it did.

{¶24} Thus, appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

JUDGMENT ENTRY

It is ordered that the **JUDGMENT BE AFFIRMED** and that appellee recover of appellant costs herein taxed.

The Court finds that there were reasonable grounds for this appeal.

It is further ordered that a special mandate issue out of this Court directing the **ROSS COUNTY COURT OF COMMON PLEAS** to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, IT IS TEMPORARILY CONTINUED FOR A PERIOD NOT TO EXCEED SIXTY (60) DAYS UPON THE BAIL PREVIOUSLY POSTED. The purpose of the continued stay is to allow appellant to file with the Supreme Court of Ohio an application for stay during the pendency of proceedings in that court.

If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of appellant to file a notice of appeal with the Supreme Court of Ohio within the forty-five (45) day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of the sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion.
Kline, J.: Concurs in Judgment Only.

FOR THE COURT

BY: _____

David T. Evans
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.