[Cite as *State v. LaBooth*, 2017-Ohio-1262.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 15 MA 0044
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
RICHARD W. LaBOOTH, JR.	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13 CR 148
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Anthony J. Farris 860 Boardman-Canfield Road Suite 204 Youngstown, Ohio 44512

JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: March 28, 2017

[Cite as *State v. LaBooth*, 2017-Ohio-1262.]
WAITE, J.

{¶1} Appellant Richard LaBooth appeals his sentence following a plea entered in the Mahoning County Common Pleas Court. Three issues are raised in this appeal. The first is whether the trial court abused its discretion when it denied Appellant's presentence motion to withdraw his guilty plea. The second issue is whether Appellant's plea was knowingly, intelligently and voluntarily entered or based on Appellant's rational calculation pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The third is whether Appellant received ineffective assistance of counsel. Regarding the first issue, based on this record the trial court did not abuse its discretion in denying Appellant's motion to withdraw his guilty plea. Appellant's *Alford* plea was entered into knowingly, voluntarily, and intelligently, as the trial court strictly complied with Crim.R. 11. Appellant also failed to establish that trial counsel's performance was deficient, and failed to establish that his motion seeking to withdraw his guilty plea would have been granted had it been timely filed. Therefore, Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Factual and Procedural Background

{¶2} Appellant was indicted on one count of felonious assault, a violation of R.C. 2901.11(A)(2), (D) with a firearm specification pursuant to R.C. 2941.145(A); one count of having weapons under a disability, a violation of R.C. 2923.13(A)(2), (B); and one count of having weapons under a disability, a violation of R.C. 2923.13(A)(3), (B) due to a shooting that took place on December 14, 2013. Appellant originally pleaded not guilty to the offenses. However, on July 22, 2013,

Appellant entered into an *Alford* plea, agreeing to plead guilty to felonious assault, in violation of R.C. 2903.11(A)(2), (D), and to a firearm specification, in violation of R.C. 2941.145(A). The state and Appellant agreed to jointly recommend to the trial court a five year term of imprisonment, without the opportunity for judicial release. The state also agreed to allow Appellant to be free on bond and placed on electronically monitored house arrest while he awaited sentencing. The trial court accepted Appellant's *Alford* plea and continued his sentencing hearing to allow Appellant to receive medical care for a leg injury in order to avoid a worsening of his medical condition.

{¶3} On June 9, 2014, Appellant appeared for sentencing. The hearing was to be conducted by another trial court judge who indicated that he understood an agreement between the parties had been reached regarding the *Alford* plea. (6/9/14 Tr., p. 5.) Defense counsel objected to the "non trial court sentencing." *Id.* The parties were then directed to the original trial court judge's courtroom to proceed with sentencing. *Id.* at p. 6. Rather than return to the original judge's courtroom, Appellant fled the courthouse. A warrant was issued for Appellant's arrest and he was later located in Columbus where the warrant was executed.

{¶4} On January 12, 2015, Appellant was brought back to the trial court for sentencing. Defense counsel orally requested to withdraw the *Alford* plea. Counsel indicated that Appellant was concerned about his health condition and that he was innocent of the charges. (1/12/15 Tr., p. 3.) The trial court denied Appellant's oral motion, stating that for the several intervening months between Appellant's last

appearance and his current appearance there had been no indication that Appellant wished to withdraw his plea. *Id.* at p. 8.

{¶5} The sentencing hearing was continued to March 17, 2015, in order for the court to obtain a presentence investigation report. At the March 17th hearing Appellant filed a motion to withdraw his plea. After hearing arguments on the motion, the trial court denied Appellant's second motion to withdraw his plea. (3/17/15 Tr., pp. 2-12.) Appellant was sentenced to four years for felonious assault, in violation of R.C. 2903.11(A)(2), (D) and three years on the firearm specification, in violation of R.C. 2941.145(A) for a total of seven years of incarceration with 366 days credit for time served under house arrest. Appellant timely appeals that judgment.

ASSIGNMENT OF ERROR NO. 1

> The hearing court abused its discretion in denying Appellant's multiple pre-sentence requests to withdraw his plea.

{¶6} Trial courts should grant presentence motions to withdraw guilty pleas "freely and liberally", while postsentence motions to withdraw guilty pleas should be granted only to correct a manifest injustice. *State v. Xie,* 62 Ohio St.3d 521, 527, 584 N.E.2d 715 (1992). Pursuant to Crim.R. 32.1, "[a] motion to withdraw a plea of guilty or no contest may be made only before [a] 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." However, there is no absolute right to a withdrawal of a guilty plea prior to sentencing. *Xie* at 527. Thus, "the trial

court must conduct a hearing to determine whether there is a reasonable and legitimate basis for the withdrawal of the plea." *Id.*

{¶7} A motion to withdraw a guilty plea 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." *State v. Smith,* 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977), paragraph two of the syllabus. Abuse of discretion means that the trial court's ruling was "unreasonable, arbitrary or unconscionable." *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶8} We have recognized there are several factors to consider when making a determination on a pre-sentence motion to withdraw a guilty plea. *State v. Cuthbertson,* 139 Ohio App.3d 895, 898-899, 746 N.E.2d 197 (7th Dist.2000), citing *State v. Fish,* 104 Ohio App.3d 236, 661 N.E.2d 788 (1st Dist.1995). The factors are as follows: (1) prejudice to the state; (2) counsel's representation; (3) adequacy of the Crim.R. 11 plea hearing; (4) extent of the plea withdrawal hearing; (5) whether the trial court gave full and fair consideration to the motion; (6) timing; (7) the reasons for the motion; (8) the defendant's understanding of the nature of the charges and the potential sentences; and (9) whether the defendant was perhaps not guilty or has a complete defense to the charge. *Id.* No single factor is absolutely conclusive in making the determination. We consider all of the factors and weigh them as a whole in determining whether the trial court abused its discretion. *Cuthbertson* at 899.

Appellant essentially argues that each of the *Fish* factors weigh in his favor, while the state asserts that a majority weigh in favor of the state.

{¶9} The first factor is prejudice to the state. Appellant contends as there is no physical evidence in the case and the state's case rested primarily on the testimony of the victim, Jeffrey Rivera, who was present in the courtroom on March 17, 2015 and was available to the prosecution, there is no prejudice to the state. The state acknowledges they would suffer no prejudice. We have held that the state's failure to allege prejudice does not require that a motion to withdraw must be granted. *State v. Leasure,* 7th Dist. No. 01 BA 42, 2002-Ohio-5019, ¶ 42. Thus, as there is no prejudice to the state this factor would weigh in Appellant's favor.

{¶10} The second factor is counsel's representation. Appellant contends he had a difficult relationship with counsel throughout the proceedings and that he was pressured by counsel into entering the *Alford* plea. Appellant also contends that he made numerous requests to withdraw his plea, including the day after he entered the plea and again in June of 2014. There is no support in the record for Appellant's assertions. The record also does not support Appellant's allegations that he was pressured into the plea or that he immediately wished to withdraw his plea. To the contrary, Appellant indicated at the hearing in July of 2013 that he was "uncomfortable" with the plea agreement but that he did not tell counsel that he wished to withdraw his plea. (3/17/15 Tr., pp. 10-12.) Defense counsel filed a written motion to withdraw on March 17, 2015 after the court denied his oral motion to withdraw at the January 12, 2015 hearing. Although it was likely the trial court would

not grant the written motion, based on its earlier ruling, an unfavorable outcome for Appellant does not indicate deficient representation by defense counsel. This factor weighs in favor of the state.

{¶11} The third factor is the adequacy of the Crim.R. 11 hearing. Appellant contends the hearing was inadequate because it appeared the judge was not immediately aware that Appellant intended to make an *Alford* plea and the court did not address Appellant's assertion that he was "heavily medicated" during the hearing and in "extreme physical distress." (Appellant's Brf., p. 8.) Here, again, Appellant misrepresents the record in this matter. At the very beginning of the hearing, the trial court inquired as to Appellant's medical condition and general health and inquired whether he was in any way impaired by medications, unable to understand the plea process, or to enter a knowing, voluntary plea. Appellant indicated that he understood the plea and answered all of the court's inquiries about his knowledge and understanding of the plea process in the affirmative multiple times throughout the hearing. In fact, Appellant raised only that he was unhappy with the prosecutor. Thus, this record demonstrates that the trial court conducted a complete Crim.R. 11 hearing in which Appellant's mental state and physical health were fully explored and Appellant indicated multiple times that he understood the terms of his *Alford* plea. This factor weighs in favor of the state.

{¶12} The fourth factor is the extent of the plea withdrawal hearing. Appellant contends there was no plea withdrawal hearing and the trial court simply read a "previously-prepared response in support of its decision to not permit the withdrawal

of the plea." (Appellant's Brf., p. 8.) Again, Appellant mischaracterizes the record and the law on this issue. A trial court must provide a full and fair hearing on the motion which can be in the form of "inviting and hearing oral arguments on a motion to withdraw a guilty plea at the sentencing hearing, immediately before sentence is imposed[.]" *State v. Griffin,* 8th Dist. No. 82832, 2004-Ohio-1246, ¶ 18. In the case *sub judice*, the trial court entertained oral arguments both on the motion to withdraw that was made orally at the January 12, 2015 hearing, and again after the written motion was filed at the hearing on March 17, 2015. In both instances, Appellant was given the opportunity to address the motions. Although the court ultimately did not rule in favor of Appellant, he was given more than adequate opportunity to present his position. This factor weighs in favor of the state.

{¶13} The fifth factor is whether the trial court gave full and fair consideration to the motion. Appellant again incorrectly contends that he was not given a hearing on his motions. This argument fails for the reasons earlier stated.

{¶14} The sixth factor is the timing of the motion. Appellant again insists that he requested defense counsel to move to withdraw his plea only one day after it was entered. Appellant contends his counsel acknowledged that Appellant requested a withdrawal in June of 2014, although an oral motion was not made until January of 2015 followed by a written motion in March of 2015. Appellant again misrepresents the record. It does not support his contention that he requested to withdraw his plea the day after it was entered. In making an *Alford* plea, Appellant acknowledged that he had decided to enter a plea in order to avoid going to trial. (7/22/13 Change of

Plea Hrg. Tr., pp. 15-16.) There is no evidence in the record that Appellant requested to withdraw his plea until January of 2015, when his oral motion was denied. This was followed in March of 2015 by a written motion, which was also denied. In the period between his plea and sentencing, Appellant had been on house arrest to facilitate medical visits and treatment and had absconded from the jurisdiction until an arrest warrant was issued and he was recovered in the Columbus area and returned. These requests for withdrawal of the guilty plea were made over a year later, and only when Appellant was to finally be sentenced. This factor weighs heavily in favor of the state.

{¶15} The seventh factor involves the reasons for the motion. Appellant states that he lacked "clarity and comprehension at the time of the plea" because of his medications and physical pain. (Appellant's Brf., p. 9.) Again, Appellant's assertions are not supported by the record. The transcripts from the hearings reflect Appellant responded multiple times in the affirmative that he fully understood the terms of the plea and was entering into it knowingly and voluntarily. Appellant's responses appear cogent and rational. The issue of Appellant's medications was addressed thoroughly by the court and there was no evidence or indication that Appellant was in any way impaired. Appellant also contends that he asserted his innocence throughout the proceedings. Those claims, without any evidence, do not provide a reasonable basis for the withdrawal of a guilty plea. *State v. Holin,* 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515, ¶ 20 (11th Dist.). Again, we note that this was an *Alford* plea. This factor also weighs in the state's favor.

{¶16} The eighth factor is Appellant's understanding of the nature of the charges and the potential sentences. Appellant maintains that due to his medications he was unable to understand the charges against him and that his only concern was that he would not be incarcerated while he was dealing with his medical condition. Once again, Appellant's assertions here are not born out on the record. At the plea hearing, the court fully inquired into Appellant's medications and whether they impaired his ability to understand the charges and the potential penalties. Multiple times Appellant responded in the affirmative. He even described at length his desire to enter an *Alford* plea to avoid going to trial because his previous conduct may be raised. There is absolutely no indication on the record, as Appellant claims, that he was so impaired by his medications that he was unable to comprehend the charges or potential sentences. This factor also weighs in the state's favor.

{¶17} The ninth and final factor is whether Appellant has raised his innocence or has a complete defense to the charge. As noted above, Appellant contends that he has maintained his innocence throughout the proceedings. Appellant has entered an *Alford* plea. As such, he of course has maintained that he is not guilty of the charged crime. However, Appellant also admits that the evidence weighs against him and has never offered any defense, meritorious or otherwise, to the charges he was facing. This factor also weighs in the state's favor.

{¶18} Considering the factors as a whole, they do not weigh in Appellant's favor. Therefore, the trial court did not abuse its discretion when it denied Appellant's

pre-sentence motion to withdraw his guilty plea. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> Appellant's Guilty (Alford) Plea was not entered knowingly, intelligently, and voluntarily nor based on Appellant's rational calculation.

{¶19} In his second assignment of error Appellant again contends his *Alford* plea was not entered in a knowing, voluntary and intelligent fashion due to his impairment from the various medications he was taking at the time of the hearing.

{¶20} A plea of guilty or no contest must be made knowingly, intelligently and voluntarily for it to be valid and enforceable. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶ 25. In order to ensure that a plea in a felony case is knowing, intelligent and voluntary, Crim.R. 11(C)(2) requires the trial judge to address the defendant personally to review the rights that are being waived and to discuss the consequences of the plea.

{¶21} Crim.R. 11(C)(2)(c) requires the court to review five constitutional rights that are waived when entering a guilty or no contest plea in a felony case: the right to a jury trial, the right to confront one's accusers, the privilege against compulsory self-incrimination, the right to compulsory process to obtain witnesses, and the right to require the state to prove guilt beyond a reasonable doubt. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 19. A trial court must strictly comply with Crim.R. 11(C)(2)(c) when advising the defendant of the constitutional rights that are being waived in entering a felony plea. *Id.* at syllabus. Prejudice is

presumed if the court fails to inform the defendant of any of the constitutional rights listed in Crim.R. 11(C)(2)(c). *Id.* at ¶ 29.

{¶22} A defendant must also be informed of his nonconstitutional rights prior to entering a guilty plea, which include the nature of the charges with an understanding of the law in relation to the facts, the maximum penalty, and that after entering a guilty plea or a no contest plea the court may proceed to judgment and sentence. Crim.R. 11(C)(2)(a)(b). The nonconstitutional requirements of Crim.R. 11 are subject to review for substantial compliance rather than strict compliance. *State v. Griggs*, 103 Ohio St.3d 85, 2004-Ohio-4415, 814 N.E.2d 51, ¶ 11-12. "Substantial compliance means that under the totality of the circumstance, the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero*, 56 Ohio St.3d 106, 108, 564 N.E.2d 474 (1990). Further, "failure to comply with nonconstitutional rights will not invalidate a plea unless the defendant thereby suffered prejudice." *Griggs*, supra, at ¶ 12.

{¶23} Where, as here, Appellant makes an *Alford* plea, the trial court had a duty to make further inquiries about the voluntariness of his plea. *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1971). An *Alford* plea occurs when a defendant pleads guilty to an offense but at the same time protests his innocence. *Id*.; *State v. Padgett*, 67 Ohio App.3d 332, 337, 586 N.E.2d 1194 (1990). An *Alford* plea is properly accepted in Ohio as knowing, voluntary and intelligent where the record discloses: (1) defendant's plea was not the result of coercion, deception or intimidation; (2) defendant's counsel was present at the time the plea

was entered; (3) defense counsel's representation was competent in light of the circumstances of the indictment; (4) the plea was entered with an understanding of the underlying charges; and (5) the defendant was motivated by a desire for a lesser penalty, a fear of the consequences of a jury trial, or both. *State v. Piacella*, 27 Ohio St.2d 92, 271 N.E.2d 852 (1971), syllabus.

{¶24} In the instant matter, Appellant contends his plea was invalid and that this is demonstrated in the record by Appellant's "rambling, drugged, pain-filled comments" at the plea hearing. (Appellant's Brf., p. 11.) A review of the transcripts of the plea hearing does not support Appellant's characterization. The state first recited the agreed terms of the plea which was followed by defense counsel's confirmation of that agreement. The court next began its colloquy and inquired about Appellant's understanding of the plea, its terms and the possible maximum penalties. (7/22/13 Change of Plea Hrg. Tr., pp. 2-6.) The trial court advised Appellant of each constitutional right he was waiving as a result of the plea as well as the appellate rights Appellant was waiving. *Id*. at pp.19-21. Appellant was also advised that he would not be eligible for probation. *Id*. at p. 18. Appellant clearly indicated multiple times throughout the hearing that he understood the terms of the plea and declined any further clarification. *Id*. at pp. 17-24.

{¶25} Regarding Appellant's claims that he was impaired because of his medications, the trial court, after learning of his medical treatment, inquired specifically about Appellant's medications and any effect on his ability to enter the plea:

THE COURT: Is there anything you're taking now that would prevent you from understanding what we're doing today or cloud your judgment or anything like that?

THE DEFENDANT: I don't know.

THE COURT: Huh?

THE DEFENDANT: I don't know.

THE COURT: Well, you got to know or we can't do this. Are you able to understand what I'm talking about here?

THE DEFENDANT: Yes, sir.

Id. at pp. 6-7.

{¶26} The court then sought defense counsel's input about the medications Appellant was taking and then returned to inquiring of Appellant:

[**DEFENSE COUNSEL**]: Your Honor, I have to be honest. I don't know anything of my client's actual medications he's on. I'm aware of his physical treatment; the bone regeneration machine he has to put on his leg quite often, and the fact that --

THE DEFENDANT: I have to have that 24 hours.

[**DEFENSE COUNSEL**]: Yeah. And the fact that it's very difficult for him to sit, stand or do anything. He has a pin in his leg but he seems -- he seems to appear in total function to me.

> **THE COURT**: Yes, he appears that way to me too. But let's, for the moment, talk for a minute about these medications. We know you have something for pain, and you said something for nerves or something?
>
> **THE DEFENDANT**: Yeah. I ain't got -- I ain't got motor skills to --
>
> [**DEFENSE COUNSEL**]: Are you on --
>
> **THE COURT**: Well, when you're talking about -- When we're talking about nerve medication, you're not talking something mental. You're talking about something physical --
>
> **THE DEFENDANT**: Yeah. Yeah.
>
> **THE COURT**: -- am I right?
>
> **THE DEFENDANT**: Yes.

Id. at pp. 7-8.

{¶27} Appellant acknowledged that he rationally thought about his case when he stated that he was concerned about the possible outcome should he go to trial due to his previous criminal record. *Id*. at p. 21. Thus, a review of the record reveals that Appellant was represented by counsel who was present and competent at the hearing; that in multiple instances, Appellant affirmed that he understood the terms of the plea, including the potential penalties, that he would not be eligible for probation, and the constitutional and appellate rights he was waiving as a result of the plea. The court halted the discussion to inquire directly from Appellant about his

medications and ability to enter into the plea to which Appellant responded satisfactorily. The record demonstrates that Appellant's plea was not entered as the result of coercion, deception or intimidation.

{¶28} Appellant has not demonstrated that the trial court failed to comply with Crim.R. 11 nor does this record reflect that his plea was not knowing, voluntary and intelligent. Therefore, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> Appellant received ineffective assistance of counsel in that counsel failed to file a motion to withdraw plea or seek to withdraw Appellant's plea in response to Appellant's initial request with resulting prejudice.

{¶29} In his third assignment of error, Appellant contends he was denied effective assistance of counsel when his counsel failed to file a motion to withdraw his guilty plea in a timely manner. Specifically, Appellant claims he sought to withdraw his plea as soon as one day after it was entered on July 23, 2013, and again approximately one year later on June 29, 2014. Defense counsel made an oral request for a withdrawal of the plea at the hearing held January of 2015, followed by a written motion to withdraw in March of 2015.

{¶30} To prevail on an ineffective assistance of counsel claim, Appellant must show not only that counsel's performance was deficient, but also that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also State v. Williams,* 99 Ohio St.3d 493, 2003-

Ohio-4396, 794 N.E.2d 27, ¶ 107. "Deficient performance" is defined as performance that falls below an objective standard of reasonable representation. *Strickland* at 687-688. Prejudice is defined as a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. Appellant's burden in an ineffective assistance of counsel challenge is to demonstrate some action or inaction by trial counsel that undermined or called into question the integrity of the process that resulted in conviction. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶31} When evaluating conduct of trial counsel, courts, "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 81.

{¶32} Appellant's arguments focus almost completely on the first prong of *Strickland* and counsel's alleged failure to file a motion to withdraw earlier, as Appellant claims he requested. It is important to note that counsel did make an oral motion followed by a written motion, both of which were presentence motions and both of which were denied by the trial court. Notwithstanding, Appellant has failed entirely to address the second prong of the *Strickland* test. He has failed to show or allege prejudice suffered by him as a result of counsel's allegedly tardy requests. Even if we were to conclude that counsel's performance was deficient, Appellant has not satisfied his requisite burden under *Strickland.* As noted above, the record is devoid of any evidence in support of Appellant's claims that he requested counsel file

an immediate withdrawal of the guilty plea. However, counsel's presentation of not one but two presentence motions to withdraw and the opportunity for Appellant to present arguments at two separate hearings regarding the requests to withdraw does not undermine or call into question the integrity of the process that resulted in Appellant's conviction. An unfavorable outcome for Appellant does not necessarily warrant a finding that counsel was ineffective, particularly when Appellant has failed to raise any evidence of prejudice. Appellant has not identified any action or inaction by defense counsel that rises to the level of a deficiency and fails to address, let alone identify, any prejudice as a result of counsel's conduct. Appellant's third assignment of error lacks merit and is overruled.

{¶33} Based on the foregoing, the trial court did not abuse its discretion when it denied Appellant's presentence motion to withdraw his guilty plea. Moreover, Appellant's *Alford* plea was entered into knowingly, voluntarily and intelligently and the record demonstrates the trial court properly complied with Crim.R. 11. Lastly, Appellant has not demonstrated an ineffective assistance of counsel. Appellant's assignments of error are without merit, are overruled and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.