

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 11AP-720
v.	:	(C.P.C. No. 89CR-4943)
	:	
Jeffery Ray Nelson,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 1, 2012

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Jeffery Ray Nelson, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Jeffery Ray Nelson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying appellant's motion to withdraw his guilty plea. For the reasons that follow, we affirm.

{¶ 2} In 1989, appellant was indicted on two counts of aggravated murder with specifications, three counts of aggravated robbery with firearm specifications, four counts of kidnapping with firearm specifications, one count of receiving stolen property, and one count of possession of a dangerous ordnance. The charges arose from the robbery of a Bob Evans restaurant and the murder of Ralph C. Webster. Although appellant was under 18 years of age at the time of the crimes, the juvenile court bound him over for prosecution as an adult.

{¶ 3} In February 1991, appellant pled guilty to one count of aggravated murder

with specifications and two counts of aggravated robbery. Pursuant to the guilty plea, appellant was sentenced to life imprisonment with no parole eligibility for 23 years on the aggravated murder charge and firearm specification, as well as concurrent sentences of 6 to 25 years of incarceration on each of the aggravated robbery charges, to be served consecutively to the sentence for aggravated murder.

{¶ 4} On May 19, 2011, appellant filed a motion to withdraw his guilty plea pursuant to Crim.R. 32.1. The trial court denied appellant's motion, concluding that appellant failed to establish that the trial court lacked subject-matter jurisdiction to accept his guilty plea and that his claim for ineffective assistance of counsel was moot. The trial court further concluded that there was no showing of manifest injustice.

{¶ 5} Appellant appeals from the trial court's judgment, assigning three errors for this court's review:

[1.] THE COURT OF COMMON PLEAS ABUSED IT'S [sic] DISCRETION WHEN DENYING A MOTION TO WITHDRAW GUILTY PLEA WHEN THE PLEA WAS ACCEPTED BY ONLY ONE JUDGE ON A[N] AGGRAVATED MURDER CHARGE WITH DEATH [PENALTY] SPECIFICATION AND THE SPECIFICATION WAS NOT DISMISSED IN VIOLATION OF R.C. 2945.06[.]

[2.] THE COMMON PLEAS COURT ABUSED IT'S [sic] DISCRETION WHEN DENYING A MOTION TO WITHDRAW PLEA WHEN THERE WAS NO JURY WAIVER SIGNED BY THE DEFENDANT OR OTHERWISE IN CONFORMITY WITH R.C. 2945.05.

[3.] THE JUDGMENT RENDERED IN THIS CASE DID NOT CONSTITUTE A FINAL APPEALABLE ORDER WHEN IT FAILED TO FOLLOW THE STATUTORY REQUIREMENTS WHEN IMPOSED[.]

{¶ 6} We begin by considering appellant's third assignment of error, in which he asserts that the judgment entry in his criminal case did not constitute a final appealable order. This is not a proper assignment of error because the lower court did not address the question of whether the judgment entry was a final appealable order. " 'Assignments of error should designate specific rulings which the appellant wishes to challenge on appeal.' " *Dailey v. R & J Commercial Contracting*, 10th Dist. No. 01AP-1464, 2002-

Ohio-4724, ¶ 17, quoting *Taylor v. Franklin Blvd. Nursing Home, Inc.*, 112 Ohio App.3d 27, 32 (8th Dist.1996). Rather, it appears that this "assignment of error" is an attempt to circumvent the state's argument that appellant has not explained the 20-year delay between the entry of his guilty plea and the filing of his motion to withdraw his guilty plea. Although this is not a proper assignment of error, in the interests of justice we will consider appellant's argument that the judgment entry was not a final appealable order.¹

{¶ 7} R.C. 2505.03(A) provides that a final order may be reviewed on appeal by a court possessing jurisdiction over the appeal. R.C. 2505.02 defines what constitutes a final order that may be appealed. With respect to final orders of conviction in criminal cases, Crim.R. 32(C) requires that "a judgment of conviction shall set forth the plea, the verdict, or findings, upon which conviction is based, and the sentence." The judge must sign the judgment, and the clerk must enter it on the journal. Crim.R. 32(C). The Supreme Court of Ohio has clarified the requirements of Crim.R. 32(C), holding that "[a] judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, paragraph one of the syllabus. The judgment in appellant's criminal case contains each of these required elements, specifying that appellant pled guilty to aggravated murder with a firearm specification and two counts of aggravated robbery. The judgment entry stated that appellant was sentenced to life imprisonment with no parole eligibility for 20 years on the aggravated murder charge and an additional three years of incarceration on the firearm specification, as well as concurrent sentences of 6 to 25 years of incarceration on the aggravated robbery convictions, to be served consecutively to the sentence for aggravated murder. The entry contains the trial judge's signature and a time stamp indicating that it was filed on February 27, 1991. Thus, the judgment entry in appellant's case satisfied the requirements of Crim.R. 32(C) and was a final appealable order.

¹ In 2008, appellant filed a motion for leave to file a delayed appeal of the judgment in his criminal case, which would appear to reflect a belief that the judgment was a final appealable order. We denied appellant's motion for delayed appeal because he failed to sufficiently explain the substantial delay in seeking an appeal and because denial of the motion would not result in a miscarriage of justice. *State v. Nelson*, 10th Dist. No. 08AP-834, ¶ 8 (Oct. 30, 2008) (memorandum decision), *appeal not accepted*, 2009-Ohio-805.

{¶ 8} Appellant argues, however, that the judgment entry was not a final appealable order because the trial court failed to follow statutory requirements in imposing that sentence. Appellant claims that the trial court lacked jurisdiction to issue the judgment entry because it did not convene a three-judge panel to accept his guilty plea and pronounce his sentence and because appellant did not sign a separate written waiver of his right to a jury trial. However, as discussed more fully below, even assuming for the purposes of analysis that the trial court committed one or both of the alleged errors, this would not prevent the judgment entry from being a final appealable order. "The failure of a court to convene a three-judge panel, as required by R.C. 2945.06, does not constitute a lack of subject-matter jurisdiction that renders the trial court's judgment void ab initio and subject to collateral attack in habeas corpus. It constitutes an error in the court's exercise of jurisdiction that *must be raised on direct appeal.*" (Emphasis added.) *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, syllabus. Similarly, a failure to comply with the requirements for a jury trial waiver under R.C. 2945.05 does not deprive the court of subject-matter jurisdiction but involves an error in the exercise of jurisdiction. *Id.* at ¶ 26. "The failure to comply with R.C. 2945.05 may be remedied only in a direct appeal from a criminal conviction." *Id.*, quoting *State v. Pless*, 74 Ohio St.3d 333 (1996), paragraph two of the syllabus.

{¶ 9} By concluding that claims of failure to comply with R.C. 2945.05 or 2945.06 were subject to direct appeal, the Supreme Court of Ohio implicitly recognized that they were also final appealable orders. A judgment that is ultimately found to be voidable due to an improper exercise of jurisdiction may constitute a final appealable order if it meets the statutory requirements. *See Washington Mut. Bank, F.A. v. Spencer*, 10th Dist. No. 05AP-1209, 2006-Ohio-3807, ¶ 8 ("The first and only indication that [the trial judge] exercised improper authority in this case was the entry he signed awarding summary judgment to appellee. That entry constituted a final appealable order."); *Evans v. Ohio Supreme Court*, 10th Dist. No. 02AP-736, 2003-Ohio-959, ¶ 17 ("Voidable judgments may only be challenged on direct appeal."); *State v. Montgomery*, 6th Dist. No. H-02-039, 2003-Ohio-4095, ¶ 9 ("A voidable judgment is subject to direct appeal."); *Eisenberg v. Peyton*, 56 Ohio App.2d 144, 151 (8th Dist.1978) ("If the judgment was voidable and not appealed, it is not a mere nullity, it cannot be disregarded, it cannot be attacked

collaterally, and it remains in full force and effect."). Thus, even if the judgment was voidable due to failure to comply with R.C. 2945.05 or 2945.06, it was a final order subject to appeal.

{¶ 10} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶ 11} We now turn to appellant's first and second assignments of error, which relate to the trial court's ruling on his motion to withdraw the guilty plea. Crim.R. 32.1 provides that "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." A defendant seeking to withdraw a guilty plea after a sentence has been imposed bears the burden of establishing that manifest injustice exists. *State v. Smith*, 49 Ohio St.2d 261 (1977), paragraph one of the syllabus. "Manifest injustice relates to some fundamental flaw in the proceedings which result[s] in a miscarriage of justice or is inconsistent with the demands of due process." *State v. Williams*, 10th Dist. No. 03AP-1214, 2004-Ohio-6123, ¶ 5.

{¶ 12} An appellate court reviews a trial court's denial of a post-sentence motion to withdraw a guilty plea under the abuse-of-discretion standard. *State v. Yun*, 10th Dist. No. 04AP-494, 2005-Ohio-1523, ¶ 8. An abuse of discretion occurs where a trial court's decision is "unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} In appellant's first assignment of error, he claims that the trial court abused its discretion in denying his motion to withdraw the guilty plea because his plea was accepted and sentence was imposed by a single judge, rather than a three-judge panel pursuant to R.C. 2945.06. R.C. 2945.06 states, in relevant part, "[i]f the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly." In this case, the trial judge accepted appellant's guilty plea and imposed the sentence without convening a three-judge panel. Appellant argues that the trial court lacked jurisdiction over the case due to the failure to convene a three-judge panel and that, based on this lack of jurisdiction, the trial court should have granted his motion to withdraw the guilty plea.

{¶ 14} We note that, under R.C. 2929.03(D)(1), the death penalty may not be imposed if an offender was under 18 years of age at the time of the offense. Prior to the plea agreement, appellant and the state stipulated that appellant was not subject to the death penalty. However, aggravated murder was still considered a "capital offense," even though the death penalty could not be imposed on appellant. *State v. Henry*, 4 Ohio St.3d 44 (1983), paragraph one of the syllabus. *See also State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149, syllabus ("An indictment charging aggravated murder and one or more specifications of aggravating circumstances listed in R.C. 2929.04(A) charges a capital offense, irrespective of whether the offender is eligible for the death penalty.").

{¶ 15} The Supreme Court of Ohio has held that "[t]he three-judge panel requirement of R.C. 2945.06 is a jurisdictional matter that cannot be waived." *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, ¶ 12, citing *State v. Filiaggi*, 86 Ohio St.3d 230, 239 (1999). The Supreme Court subsequently clarified this holding, explaining that the failure to convene a three-judge panel is an error in a trial court's *exercise of jurisdiction*, not an error that deprives the trial court of subject-matter jurisdiction over the case. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 21. Thus, contrary to appellant's argument, the trial court had subject-matter jurisdiction over his case.

{¶ 16} The Supreme Court further stated that the remedy for a trial court's failure to convene a three-judge panel under R.C. 2945.06 is through direct appeal. *Id.* at ¶ 21, 24. Although appellant pled guilty and was sentenced in 1991, he did not seek direct appeal of his sentence for more than 17 years until he filed a motion for leave to file a delayed appeal in 2008. We denied that motion, concluding in part that he failed to sufficiently explain the substantial delay in seeking an appeal. *State v. Nelson*, 10th Dist. No. 08AP-834 (Oct. 30, 2008) (memorandum decision), *appeal not accepted*, 2009-Ohio-805. However, in his motion for delayed appeal, appellant did not raise an assignment of error based on the trial court's failure to convene a three-judge panel to take his plea under R.C. 2945.06. As explained in *Pratts*, failure to comply with R.C. 2945.06 is a matter that is properly raised on direct appeal.

{¶ 17} Further, in the context of a motion to withdraw his guilty plea after the imposition of the sentence, appellant must demonstrate that a manifest injustice exists. In this case, appellant does not claim that he is innocent but, rather, seeks to have his

sentence overturned based on an alleged procedural error. The Eighth District Court of Appeals considered a similar case in *State v. Woods*, 8th Dist. No. 82120, 2003-Ohio-2475. In *Woods*, the defendant was charged with two counts of aggravated murder with capital murder specifications, two counts of arson, one count of aggravated robbery, one count of receiving stolen property, and gun specifications. *Id.* at ¶ 4, 17. In exchange for a guilty plea on one count of aggravated murder and an agreed sentence of life imprisonment with parole eligibility after 20 years, the prosecution agreed not to seek the death penalty and not to pursue the other felony charges. *Id.* at ¶ 4. A single judge accepted the defendant's plea and imposed the agreed sentence. *Id.* at ¶ 5. The defendant later sought to withdraw the guilty plea based on the failure to convene a three-judge panel under R.C. 2945.06. The appellate court noted that the defendant had not initiated a direct appeal until he filed for a motion for delayed appeal six years after the conviction. *Id.* at ¶ 6. Following the denial of the motion for delayed appeal, the defendant moved to withdraw his guilty plea. *Id.* The court of appeals concluded that the defendant failed to establish manifest injustice requiring withdrawal of the guilty plea:

While *Woods* argues that, had a three-judge panel evaluated the facts of the case and found him guilty of an offense lesser than aggravated murder, it may have sentenced him to a shorter prison term than that imposed, his argument ignores the fact that the term imposed was a part of his plea bargain. Put another way, without explicit agreement to a twenty year-to-life prison sentence, it is pure conjecture that the State would have extended the plea offer at all. We cannot say in hindsight that the bargain *Woods* negotiated prior to trial was a bad one, in view of the fact that, the procedural violation of Crim.R. 11(C)(3) and R.C. 2945.06 notwithstanding, the plea hearing was perfect in terms of notifying *Woods* of the constitutional rights he was giving up in pleading guilty, and he unambiguously indicated the voluntary, intelligent and knowing nature of his plea. No error has been assigned relative to this aspect of the proceedings. Hence, this case does not come within the "extraordinary" category of cases for which vacating a guilty plea is made necessary by manifest injustice in the results of the plea.

Id. at ¶ 18. The appellate court affirmed the trial court's denial of the motion to withdraw the guilty plea.

{¶ 18} Although appellant was not eligible for the death penalty due to his age, in other respects his case is similar to *Woods*. Appellant was indicted on 11 felony counts but ultimately pled guilty to only 3 charges. By pleading guilty, appellant avoided the potential additional prison sentences that would have resulted from conviction on some or all of the eight charges that were dropped. Moreover, as in *Woods*, the guilty plea form and plea agreement form, along with the plea and sentencing hearing, demonstrate that appellant was fully apprised of the rights he was giving up by pleading guilty. Appellant stated that he understood the meaning of his guilty pleas and understood the sentence that would be imposed. Appellant chose to enter the plea and accept the sentence provided. We find no manifest injustice resulting from the fact that the plea was accepted and sentence was imposed by a single judge, rather than by a three-judge panel. Absent a showing of manifest injustice, the trial court did not abuse its discretion by denying appellant's motion to withdraw his guilty plea.

{¶ 19} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶ 20} Finally, in appellant's second assignment of error, he asserts that the trial court abused its discretion in denying his motion to withdraw the guilty plea because he did not sign a written waiver of his right to a jury trial. Appellant did not raise this issue to the trial court in his motion to withdraw the guilty plea. " '[F]ailure to present an argument in a post-sentence motion to withdraw a guilty plea waives the argument for purposes of appeal.' " *State v. Barrett*, 10th Dist. No. 11AP-375, 2011-Ohio-4986, ¶ 13, quoting *State v. Totten*, 10th Dist. No. 05AP-278, 2005-Ohio-6210, ¶ 9. Thus, appellant waived this argument by failing to include it in his motion to withdraw the guilty plea. However, in the interests of justice, we will consider appellant's argument.

{¶ 21} R.C. 2945.05 provides that, in all criminal cases, the defendant may waive the right to a jury trial and be tried by the court. The waiver must be in writing, signed by the defendant, and filed as part of the record. R.C. 2945.05. Similarly, Crim.R. 23(A) provides that, in serious offense cases, a defendant may "knowingly, intelligently and voluntarily waive in writing his right to trial by jury." Appellant claims that he did not sign a separate waiver of his right to a jury trial and, therefore, argues that the trial court lacked jurisdiction to accept his guilty plea. However, "[i]t is well established that the

entry of a plea of guilty by an accused constitutes a waiver of a jury trial." *McAuley v. Maxwell*, 174 Ohio St. 567, 568 (1963). Accordingly, "[t]he provisions of Section 2945.05, Revised Code, requiring the filing of a written waiver of a trial by jury are not applicable where a plea of guilty is entered by an accused." *Martin v. Maxwell*, 175 Ohio St. 147 (1963).

{¶ 22} As the Twelfth District Court of Appeals recently stated, "Ohio courts have consistently recognized that the entry of a plea of guilty by an accused constitutes a waiver of a jury trial and, as a result, the mandates of R.C. 2945.05 are no longer applicable." *Fairfield v. Hamilton*, 12th Dist. No. CA2009-06-171, 2009-Ohio-6551, ¶ 6. *See also State v. Masterson*, 8th Dist. No. 90505, 2008-Ohio-4704, ¶ 13 ("R.C. 2945.05 is not applicable, however, in instances where a guilty plea is entered by a defendant."); *Hitchcock v. Wilson*, 11th Dist. No. 2003-T-0131, 2004-Ohio-1073, ¶ 6 ("[W]hen a guilty plea is made, the requirement of written jury waiver under R.C. 2945.05 is simply inapplicable because the defendant will never be subject to an actual trial."); *State v. Schofield*, 4th Dist. No. 99 CA 10, 1999 WL 1225564, *7 (Dec. 10, 1999) ("The provisions of Crim.R. 23(A) and R.C. 2945.05 do not apply, however, when a defendant elects to plead guilty."). In this case, appellant pled guilty to charges of aggravated murder and aggravated robbery. As a result of the guilty plea, the requirement for appellant to sign a separate written waiver of his right to a jury trial did not apply.

{¶ 23} Moreover, the record below reflects that appellant was aware that he was giving up his right to a jury trial by pleading guilty. The guilty plea form that appellant signed included an acknowledgment that he understood that by pleading guilty he was waiving certain constitutional, statutory, and procedural rights, including the right to a trial by jury. At the sentencing hearing, appellant acknowledged that he had signed the guilty plea form. Further, at the sentencing hearing, appellant verbally acknowledged that he understood he was waiving his right to a jury trial.

{¶ 24} Appellant's guilty plea eliminated the need for him to sign a written waiver of his right to a jury trial. He signed a guilty plea that acknowledged he was waiving his right to a trial by jury and he verbally acknowledged at sentencing that he understood he was waiving this right. Thus, even if appellant had not waived this argument by failing to include it in his motion to the trial court, the argument would fail on its merits. Under the

circumstances of this case, no written waiver of the right to a jury trial was required, and there is no manifest injustice created by refusing to grant a motion to withdraw the guilty plea on that basis.

{¶ 25} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶ 26} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
