

[Cite as *State v. Phillips*, 2009-Ohio-4521.]

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

THOMAS E. PHILLIPS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. John W. Wise, J.

Hon. Patricia A. Delaney, J.

Case No. CT2009-0002

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. CR2008-0170

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

September 1, 2009

APPEARANCES:

For Plaintiff-Appellee

ROBERT L. SMITH  
27 North Fifth Street  
Zanesville, OH 43701

For Defendant-Appellant

DAVID A. SAMS  
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*Farmer, P.J.*

{¶1} On July 9, 2008, the Muskingum County Grand Jury indicted appellant, Thomas Phillips, on one count of murder in violation of R.C. 2903.02. On September 12, 2008, pursuant to a plea agreement, appellant pled guilty to one count of voluntary manslaughter in violation of R.C. 2903.03. By entry filed December 9, 2008, the trial court sentenced appellant to ten years in prison.

{¶2} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶3} "THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS HE WAS NOT APPRISED OF HIS CONSTITUTION RIGHT TO JURY UNANIMITY."

II

{¶4} "THE DEFENDANT-APPELLANT'S CONVICTION IS VOID."

I

{¶5} Appellant claims the trial court erred in not informing him during his plea that he had the right to a unanimous jury. We disagree.

{¶6} R.C. 2945.05 sets forth with particularity a defendant's right to waive jury trial and the language required to do so:

{¶7} "In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver

by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: 'I \_\_\_\_\_, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury.'

{¶8} "Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

{¶9} There is no dispute that the statute was complied with in the case sub judice. This court has visited the unanimous jury issue in several cases, including *State v. Murphy*, Muskingum App. No. CT2008-0067, 2009-Ohio-2690, *State v. Wesaw*, Fairfield App. No. 08CA12, 2008-Ohio-5572, *State v. Smith*, Muskingum App. No. CT2007-0073, 2008-Ohio-3306, and *State v. McBraver*, Muskingum App. No. CT2008-0015, 2008-Ohio-4207, and has held the criminal rules and the revised code are satisfied by a written waiver of jury trial, signed by the defendant, made in open court, and filed with the court, after arraignment and an opportunity to consult with counsel.

{¶10} The rulings by this court are consistent with the Supreme Court of Ohio's decisions in *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, *State v. Fitzpatrick*, 102 Ohio St. 3d 321, 2004-Ohio-3167, *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216, and *State v. Jells* (1990), 53 Ohio St.3d 22.

{¶11} Assignment of Error I is denied.

## II

{¶12} Appellant claims his conviction is void because he pled guilty to voluntary manslaughter which was not a lesser included offense of the indicted charge of murder. We disagree.

{¶13} Appellant argues R.C. 2903.03, voluntary manslaughter, is not a lesser included offense of R.C. 2903.02, murder.

{¶14} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, paragraphs one and three of the syllabus, the Supreme Court of Ohio held the following:

{¶15} "1. Under an R.C. 2941.25(A) analysis, the statutorily defined elements of offenses that are claimed to be of similar import are compared *in the abstract*. (*Newark v. Vazirani* [1990], 48 Ohio St.3d 81, 549 N.E.2d 520, overruled.)

{¶16} "3. In Ohio it is unnecessary to resort to the *Blockburger* test in determining whether cumulative punishments imposed within a single trial for more than one offense resulting from the same criminal conduct violate the federal and state constitutional provisions against double jeopardy. Instead, R.C. 2941.25's two-step test answers the constitutional and state statutory inquiries. The statute manifests the General Assembly's intent to permit, in appropriate cases, cumulative punishments for the same conduct. (*Garrett v. United States* [1985], 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764; *Albernaz v. United States* [1981], 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275; *State v. Bickerstaff* [1984], 10 Ohio St.3d 62, 10 OBR 352, 461 N.E.2d 892, approved and followed.)" (Emphasis *sic*.)

{¶17} The *Rance* court explained the following at 636:

{¶18} "With its multiple-count statute Ohio intends to permit a defendant to be punished for multiple offenses of *dissimilar import*. R.C. 2941.25(B); *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816, 817. If, however, a defendant's actions 'can be construed to constitute two or more allied offenses of *similar import*,' the defendant may be convicted (*i.e.*, found guilty and punished) of only one. R.C. 2941.25(A). But if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both pursuant to R.C. 2941.25(B). *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14, 676 N.E.2d 80, 81." (Emphasis *sic.*)

{¶19} In *State v. Patterson*, Muskingum App. No. CT2008-0054, 2009-Ohio-273, ¶12-15, this court held the following:

{¶20} "Because the amendment was part of a negotiated plea agreement, it matters not whether the amended charge was a lesser-included offense of the original charge. To hold otherwise violates the invited error doctrine. Furthermore, by not objecting to the amendment before the guilty plea was entered, Appellant has waived his right to assert error therein.

{¶21} "Finally, we note Crim. R. 11(F) contemplates such an amendment in negotiated pleas in felony cases. It provides:

{¶22} " 'When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court' (Emphasis added).

{¶23} "Accordingly, an amendment in negotiated plea felony cases is not limited to lesser included offenses."

{¶24} Assignment of Error II is denied.

{¶25} The judgment of the Court of Common Pleas of Muskingum County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Patricia A. Delaney

JUDGES

SGF/sg 0813

