[Cite as *State v. DelManzo*, 2010-Ohio-3555.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-167**
- vs -	:	
PAUL E. DELMANZO, a.k.a. PAUL JOHNSTON, a.k.a. PAUL JOHNSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 000171.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul E. DelManzo, pro se, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Paul E. DelManzo, a.k.a. Paul Johnston, a.k.a. Paul Johnson, appeals the judgment of the Lake County Court of Common Pleas denying his post-sentence motion to withdraw his guilty plea entered by the Lake County Court of Common Pleas. Appellant had previously pled guilty to aggravated vehicular homicide and operation of a vehicle under the influence of alcohol. At issue is whether the trial

court abused its discretion in denying appellant's motion. For the reasons that follow, we affirm.

{¶2} On March 2, 2008, at about 7:30 p.m., appellant took his girlfriend Denise Becker-Hill to a party at the Willoughby Brewing Company. While there, according to appellant, he had a few drinks, although he was the designated driver that night. They stayed until about 10:30 p.m., at which time appellant began driving Denise home in his SUV. While driving on Interstate Route 90 at speeds in excess of 80 m.p.h., appellant drove through a construction site and caused his vehicle to roll over. Denise was thrown from the vehicle and sustained fatal injuries. She was declared dead at the hospital, leaving her two young children, ages five and nine, without a mother. Responding police officers determined appellant was driving while impaired with a blood-alcohol level of .154.

{¶3} Appellant was charged in a four-count indictment with aggravated vehicular homicide while operating a vehicle under the influence of alcohol, a felony of the second degree, in violation of R.C. 2903.06 (A)(1)(a) (Count One); aggravated vehicular homicide caused by reckless driving, a felony of the third degree, in violation of R.C. 2903.06(A)(2)(a) (Count Two); operating a vehicle under the influence of alcohol ("OVI"), a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a) (Count Three); and operating a vehicle with a prohibited concentration of alcohol in his blood ("BAC"), a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(b) (Count Four).

{¶4} Appellant pled not guilty and filed a motion to suppress. After one day of testimony on the motion, appellant withdrew the motion and entered a plea bargain with

the state. Pursuant to that agreement, appellant agreed to plead guilty to Count Two, aggravated vehicular homicide, a felony of the third degree, and to Count Four, BAC, a misdemeanor of the first degree, and in exchange the remaining two counts would be dismissed. Further, the parties agreed that at sentencing, appellant would ask the court to sentence him to prison for not less than two and one-half years, and the state would be free to ask for whatever sentence it believed was appropriate up to the maximum sentence of five and one-half years.

{¶5} On October 10, 2007, the trial court held a change-of-plea hearing, at which the parties read their plea bargain on the record. The trial court advised appellant of the nature of the charges to which he would be pleading guilty and appellant said he understood the charges. The court also advised appellant of the rights he would be waiving by pleading guilty, including the right to trial by jury at which the state would be required to prove his guilt beyond a reasonable doubt, the right to counsel, the right to cross-examine the state's witnesses, the right to call or to subpoena witnesses in his behalf, and the right not to be compelled to testify against himself. The court also advised appellant that by pleading guilty, he would be withdrawing his motion to suppress, and that the hearing on that motion, which was then in progress, would not proceed. After the court explained the foregoing to appellant, he said he understood and still wanted to plead guilty.

{¶6} The court advised appellant, and he said he understood, that his guilty plea would be a complete admission of his guilt and the facts as alleged by the state, and that he could not "argue later on [he] didn't do it, someone else is to blame." The

court also explained, and appellant said he understood, that as a result of his guilty plea, appellant would be found guilty by the court and he would then be sentenced.

{¶7} The court advised appellant, and he said he understood, that Count Two, aggravated vehicular homicide, as a felony of the third degree, is punishable by a term in prison of one, two, three, four, or five years, and Count Four, BAC, is punishable by a sentence of up to six months, the terms of which can be ordered to be served consecutively, for a potential maximum sentence of five and one-half years in prison.

{¶8} Appellant said no one had promised him anything in order to induce him to plead guilty; that he had not been threatened or coerced in any way to enter his plea; and that he was entering his plea freely and voluntarily.

{¶9} Appellant said he had had enough time to discuss the case with his attorney, and that he was satisfied with his representation.

{¶10} The prosecutor advised the court that, if the case had gone to trial, the evidence would have shown that appellant was driving his SUV on Route 90 in excess of 80 m.p.h. with Ms. Becker-Hill. At that time appellant was under the influence of alcohol with a blood-alcohol level of .154, almost twice the legal limit. As a result of the reckless operation of his vehicle, he caused Ms. Becker-Hill's death. After this recitation of the facts, appellant advised the court they were true.

{¶11} Appellant pled guilty to Counts Two and Four. The court then gave appellant's counsel a Written Plea of Guilty and Judgment Entry, which, the court said, set forth everything the court had just explained. The court asked appellant to review this entry and if he wanted to plead guilty, to sign it in open court.

{¶12} Appellant's attorney told the court that he had reviewed the written guilty plea with appellant before coming to court. He said, "[w]e've read over every single word of it. He's signing it now." Appellant told the court he understood everything in that document. The court found that appellant made a knowing, voluntary, and intelligent waiver of his rights, and understood the nature of the charges and the potential sentence that could be imposed, and then accepted appellant's guilty plea and found him guilty of both offenses. The court dismissed Counts One and Three, and referred the case for a pre-sentence report.

{¶13} A sentencing hearing was held on November 29, 2007. Appellant's attorney asked the court to sentence appellant to two and one-half years in prison. The prosecutor advised the court that appellant had a significant felony record. He had been sentenced to prison on two prior occasions in 1986 and 1988 following his conviction on multiple felonies. The prosecutor asked the court to impose the maximum sentence. The trial court sentenced appellant to five years on his guilty plea to aggravated vehicular homicide and six months on his plea to BAC, the two sentences to be served consecutively.

{¶14} Appellant filed a direct appeal in *State v. DelManzo*, 11th Dist. No. 2007-L-218, 2008-Ohio-5856 ("*DelManzo I*"), in which this court affirmed appellant's conviction.

{¶15} Approximately one year after his sentence, on September 15, 2008, appellant filed a motion to withdraw his guilty plea. On November 17, 2009, the trial court denied appellant's motion, finding that his guilty plea was knowing, intelligent, and voluntary and that he had failed to demonstrate a manifest injustice.

{¶16} Appellant appeals the trial court's judgment, asserting four assignments of error and a supplemental assignment of error. Since his first, second, third, and supplemental assignments of error are interrelated, they shall be considered together. They allege:

{¶17} "[1.] Mr. Delmanzo's [sic] Invalid Guilty Plea is a Product of Material Misrepresentation in Violation of Fundamental Due Process Clause of the 14th Amendment to the United States Constitution and Article I, Section 16 of The Ohio Constitution.

{¶18} "[2.] The Searches and Seizure [sic] of Mr. DelManzo is in Violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of The Ohio Constitution.

{¶19} "[3.] Mr. DelManzo's Guilty Plea is a Product of Defective Representation of Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of The Ohio Constitution.

{¶20} "[Supplemental] The trial court and trial counsel erred to the prejudice of Appellant, when it failed to inform him of potential collateral consequences resulting from his guilty plea under Crim.R. 11(C)(2)(B) [sic]."

{¶21} Crim.R. 32.1 provides that "[a] motion to withdraw a plea of guilty *** may be made only before sentence is imposed ***; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit a defendant to withdraw his plea." "A defendant who seeks to withdraw a guilty plea after sentence has the burden of establishing a manifest injustice." *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, at ¶23, citing *State v. Smith* (1977), 49

Ohio St.2d 261, at paragraph one of the syllabus. Under such standard, a post-sentence withdrawal motion is allowable only in extraordinary cases to correct a manifest injustice. Id. at 264; *State v. Glenn*, 11th Dist. No. 2003-L-022, 2004-Ohio-2917, at ¶26; *State v. Mack*, 11th Dist. No. 2005-P-0033, 2006-Ohio-1694, at ¶15. The logic behind this high standard is "to discourage a defendant from pleading guilty to test the weight of potential reprisal, and later withdraw the plea if the sentence was unexpectedly severe." *State v. Caraballo* (1985), 17 Ohio St.3d 66, 67, citing *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213.

{¶22} "Manifest injustice is determined by examining the totality of the circumstances surrounding the guilty plea. *Paramount in this determination is the trial court's compliance with Crim.R. 11(C), evidence of which must show in the record that the accused understood his rights accordingly*." (Emphasis added.) *State v. Padgett* (Jul. 1, 1993), 8th Dist. No. 64846, 1993 Ohio App. LEXIS 3374, *2. A defendant seeking to withdraw a guilty plea following the imposition of sentence bears the burden of establishing manifest injustice with specific facts either contained in the record or supplied through affidavits submitted with the motion. *State v. Jordan*, 10th Dist. No. 04AP-42, 2004-Ohio-6836, at ¶5.

{¶23} The decision whether to grant or deny a post-sentence motion to withdraw a guilty plea is within the sound discretion of the trial court. *Smith*, supra, at paragraph two of the syllabus; *State v. Pearson*, 11th Dist. Nos. 2002-G-2413 and 2002-G-2414, 2003-Ohio-6962, at ¶7. The good faith, credibility, and weight of the movant's assertions in support of the motion are to be resolved by the trial court. *Smith*, supra; *Jordan*, supra, at ¶5. Accordingly, appellate review of the trial court's denial of a post-

sentence motion to withdraw a guilty plea is limited to a consideration of whether the lower court abused its discretion. *Pearson*, supra; *Glenn*, supra, at ¶27. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, at ¶30, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶24} Appellant argues that his guilty plea was not voluntary and his plea was therefore invalid because the trial court failed to inform him of the elements of the crimes to which he pled guilty and, further, because the court failed to ensure that he understood the consequences of his guilty plea.

{¶25} As a preliminary matter, we note that appellant failed to assert this argument in his motion to withdraw his guilty plea. The issue is therefore waived on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120, 122.

{¶26} Moreover, although the issue was apparent at the time, appellant failed to raise it during his guilty plea hearing or on direct appeal. It is therefore also barred by res judicata. *State v. Dudas*, 11th Dist. Nos. 2007-L-170 and 2007-L-171, 2008-Ohio-3260, at ¶21. "In the context of criminal cases, 'a convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was

raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.'" (Emphasis omitted.) Id., quoting *State v. Szefcyk*, 77 Ohio St.3d 93, 96, 1996-Ohio-337.

{¶27} Further, appellant does not specify the elements of either offense that were allegedly omitted from the guilty plea colloquy. Nor does he argue how the court failed to ensure he understood the consequences of his plea. Due to this complete lack of specificity, appellant's argument violates App.R. 16(A)(7). For this additional reason, his argument lacks merit.

{¶28} However, even if the argument was properly before us, it would lack merit. Generally, a guilty plea is deemed voluntary if the record demonstrates the trial court advised the defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a guilty plea, and (3) that the defendant will waive his constitutional rights by entering the plea. *State v. Madeline*, 11th Dist. No. 2000-T-0156, 2002-Ohio-1332, 2002 Ohio App. LEXIS 1348, *11, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, *27-*28.

{¶29} Based on our review of the transcript of the guilty plea hearing, the trial court scrupulously complied with Crim.R. 11. First, the court explained to appellant the elements of both charges to which he was pleading guilty, and appellant said he understood the charges.

{¶30} Second, the court also explained to appellant the consequences of his guilty plea by advising him that if he entered such a plea, he would be found guilty and sentence would be imposed. After this explanation, appellant said he understood.

{¶31} For the foregoing reasons, the record supports the trial court's finding that appellant's guilty plea was made knowingly, intelligently, and voluntarily and that appellant failed to establish the existence of manifest injustice. We therefore hold the trial court did not abuse its discretion in denying appellant's motion to withdraw his guilty plea.

{¶32} Appellant also argues the indictment's omission of the mens rea element resulted in structural error. However, he does not allege which charge suffers from this alleged infirmity. In any event, because appellant's conviction was based on a guilty plea, and therefore the alleged error did not result in a series of constitutional errors that permeated a trial, any alleged error in this regard could not have been structural in nature. In *State v. Dudas*, 11th Dist. Nos. 2008-L-109 and 2008-L-110, 2009-Ohio-1001, this court held that an appellant is precluded from asserting structural error under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, where his conviction is based on a guilty plea. *Dudas* at ¶43. In any event, we note that the mens rea of aggravated vehicular homicide, i.e., recklessly, is included in the indictment.

{¶33} Next, appellant argues his guilty plea was not voluntary because he was denied effective assistance of counsel. A properly licensed attorney is presumed to have rendered effective assistance to a defendant. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient; and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty.

Madeline, supra, at *9-*10, citing *Hill v. Lockhart* (1985), 474 U.S. 52. The burden of proving ineffective assistance of counsel falls upon the defendant. *Madeline* at *10.

{¶34} "The mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is *not* sufficient to establish the requisite connection between the guilty plea and the ineffective assistance." (Emphasis sic.) Id., citing *Sopjack,* supra, at *11, citing *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780, *4-*5. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *Madeline*, supra.

{¶35} A guilty plea represents a break in the chain of events that preceded it in the criminal process. Thus, a defendant who admits his guilt waives the right to challenge the propriety of any action taken by the court or counsel prior to that point in the proceedings unless it affected the knowing and voluntary nature of the plea. Id. at *10-*11; *Haynes*, supra, at *3-*4. This waiver applies to a claim of ineffective assistance of counsel, unless the alleged conduct caused the plea not to be knowing and voluntary. *Madeline*, supra, at *11.

{¶36} A claim that a guilty plea was induced by ineffective assistance of counsel must be supported by evidence where the record of the guilty plea shows it was voluntarily made. *State v. Malesky* (Aug. 27, 1992), 8th Dist. No. 61290, 1992 Ohio App. LEXIS 4378, *5; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36. In *Malesky*, supra, the court held:

{¶37} "A naked allegation by a defendant of a guilty plea inducement, is insufficient to support a claim of ineffective assistance of counsel, and would not be

upheld on appeal unless it is supported by affidavits or other supporting materials, substantial enough to rebut the record which shows that his plea was voluntary."

{¶38} In *Kapper*, the Supreme Court adopted the following rationale:

{¶39} "'*** [A]n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are insufficient to rebut the record on review which shows that his plea was voluntary. A letter or affidavit from the court, prosecutors or defense counsel alleging a defect in the plea process may be sufficient to rebut the record on review and require an evidentiary hearing.'" Id. at 38, citing *State v. Jackson* (1980), 64 Ohio St.2d 107.

{¶40} Appellant argues his trial counsel was ineffective because (1) he did not investigate his allegation that the prosecutor abused the grand jury process by presenting perjured testimony; (2) he induced appellant to enter his guilty plea; and (3) he did not proceed with the suppression hearing after appellant pled guilty.

{¶41} However, based on our review of the record, there are no affidavits or other supporting materials in the record showing: (1) that the prosecutor presented perjured testimony to the grand jury; (2) what the alleged perjury consisted of; (3) that appellant ever shared with his attorney his concern about the alleged use of perjured testimony; (4) that his attorney induced him to enter his guilty plea; or (5) that his attorney was obligated to proceed with the suppression hearing even after appellant pled guilty. As a result, there is no evidence substantial enough to rebut the record below that demonstrates that appellant's guilty plea was voluntarily entered.

{¶42} We note that appellant received the benefit of his bargain. In exchange for his guilty plea to one count of aggravated vehicular homicide, a third-degree felony, and BAC, the state moved to dismiss and the court dismissed the remaining counts, including the most serious offense with which appellant was charged, i.e., aggravated vehicular homicide, a felony of the second degree.

{¶43} For the foregoing reasons, we cannot conclude that counsel's performance fell below an objective standard of reasonableness.

{¶44} Further, appellant cannot meet the second prong of the *Hill* test because he admitted that he understood the terms of the plea bargain and that he was satisfied with the representation of his counsel. Moreover, there is no evidence in the record to demonstrate that, but for the alleged failings of his attorney, he would not have pled guilty and would instead have insisted on a trial. Further, there is no evidence that trial counsel's alleged failings precluded appellant from entering his guilty plea knowingly, intelligently, and voluntarily. We therefore cannot conclude that appellant was prejudiced from any alleged deficient conduct on the part of his counsel.

{¶45} Next, appellant argues his guilty plea is invalid because the state presented perjured testimony before the grand jury in violation of his due process rights. He also argues that he was subjected to an illegal search and seizure; that statements taken from him by the police were inadmissible; and that blood and breath tests administered to him did not comply with the Ohio Administrative Code.

{¶46} As a preliminary matter, we note that appellant could have but failed to raise these issues during his guilty plea hearing or in his direct appeal. They are therefore barred by res judicata, *Szefcyk*, supra.

{¶47} Further, appellant does not reference the record in support of these arguments. An appellate court in determining the existence of error is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, *2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without any evidence in support of these arguments, there is nothing for us to consider. On appeal it is the appellant's responsibility to support his argument by evidence in the record that supports his or her assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. For this additional reason, his argument lacks merit.

{¶48} In any event, these arguments are precluded by appellant's guilty plea. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson* (1973), 411 U.S. 258, 267.

{¶49} In *Lefkowitz v. Newsome* (1975), 420 U.S. 283, the Supreme Court held:

{¶50} "*** Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits *** of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. *** It is in this sense, therefore, that ordinarily 'a guilty plea represents a break in the chain of events which has preceded it in the criminal process.'" (Citations omitted.) Id. at 289, quoting *Tollett*, supra.

{¶51} The Supreme Court held in *Haring v. Prosise* (1983), 462 U.S. 306:

{¶52} "'*** [A] counseled plea of guilty is an admission of factual guilt[] so reliable that *** it quite validly removes the issue of factual guilt from the case. In most cases,

factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt ***.'" (Emphasis omitted.) Id. at 321, quoting *Menna v. New York* (1975), 423 U.S. 61, 62-63, fn. 2.

{¶53} Further, once a defendant pleads guilty, he cannot later claim his innocence because "[a] plea of guilty is a complete admission of guilt." *State v. Pugh*, 8th Dist. No. 92633, 2009-Ohio-4374, at ¶10, citing *State v. Stumpf* (1987), 32 Ohio St.3d 95, 104. By entering a plea of guilty, the accused is not simply stating that he committed the acts alleged in the indictment; he is admitting guilt of a substantive crime. *State v. Gaston*, 8th Dist. No. 92242, 2009-Ohio-3080, at ¶7. Therefore, ""[a] criminal defendant who pleads guilty is limited on appeal; he may only attack the voluntary, knowing, and intelligent nature of the plea ***."" *Gaston*, supra, quoting *State v. Woods*, 3d Dist. No. 1-05-82, 2006-Ohio-2368, at ¶14, quoting *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130.

{¶54} Appellant's argument that the state presented perjured testimony to the grand jury and his argument that the state unlawfully seized evidence from him are barred by his guilty plea because such arguments relate to the deprivation of rights that allegedly occurred prior to the entry of appellant's guilty plea; they challenge appellant's factual guilt; and, moreover, they have nothing to do with whether his guilty plea was voluntary.

{¶55} Appellant also argues the trial court should have advised him that his guilty plea might subject him to a civil action. However, he fails to cite any authority in support. Moreover, Crim.R. 11 does not require any such explanation.

{¶56} Appellant's first, second, third, and supplemental assignments of error are overruled.

{¶57} For his fourth assigned error, appellant alleges:

{¶58} "The Trial Court Erred in Accepting Mr. DelManzo's Guilty Plea on [sic] violation of His Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution."

{¶59} Appellant argues his guilty plea was invalid because there was no factual basis for the plea. As a preliminary matter, we note that because this issue could have been but was not raised at appellant's guilty plea hearing or on direct appeal, it is barred by res judicata. In any event, it is well settled that in accepting a guilty plea, a trial court is not required to determine if a factual basis for the plea exists. *State v. Eberhardt* (May 6, 1976), 8th Dist. No. 34817, 1976 Ohio App. LEXIS 8382, *5, citing *Roddy v. Black* (6 C.A., 1975), 516 F.2d 1380, 1385. However, in the instant case, the prosecutor provided a factual basis for the plea. The trial court then asked appellant if these facts were true and he said, "yes." As a result, appellant admitted there was a factual basis for his guilty plea.

{¶60} Appellant's fourth assignment of error is overruled.

{¶61} As a final note, we observe that in his reply brief, appellant purports to challenge the manifest weight of the evidence. However, by first raising such argument in his reply brief, appellant has deprived the state of the opportunity to respond. Also, since appellant's conviction is based on his guilty plea, rather than the evidence, the argument is not germane. This argument therefore lacks merit.

{¶62} For the reasons stated in the Opinion of this court, the assignments of error are not well taken. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.