STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 93 C.A. 211
VS.	)	
	)	O P I N I O N
ELMER E. AHART, JR.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court Case No. 92CR604

JUDGMENT: Affirmed

APPEARANCES:

For Plaintiff-Appellee:

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Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 28, 2001

DONOFRIO, J.

Defendant-appellant, Elmer Ahart Jr., appeals his conviction in Mahoning County Common Pleas Court, following guilty pleas, for three counts of aggravated murder and one count of attempted aggravated murder, with accompanying specifications.

On July 17, 1992, a Mahoning County Grand Jury returned an indictment against appellant setting forth four counts. Counts 1, 2, and 3 were for aggravated murder. Count 4 was for attempted aggravated murder. Each count carried a specification of the aggravating circumstance that the offense was part of a course of conduct involving the purposeful killing of two or more persons by appellant. R.C. 2929.04(A)(5). Each count also carried with it a firearm specification.

Appellant initially pleaded not guilty to all counts. However, on September 14, 1993, appellant retracted his not guilty plea and entered a guilty plea as to all of the counts listed in the indictment. In exchange for appellant's guilty plea, plaintiff-appellee, the State of Ohio, agreed not to pursue the death penalty and merged the four firearm specifications into one. Appellee did not amend the indictment to dismiss or delete the capital specifications. Pursuant to his plea agreement, appellant was sentenced by a single trial judge to serve twenty full years of imprisonment on each of the three counts of aggravated murder, three years of actual

incarceration for the firearms specification, and ten to twenty-five years for the attempted aggravated murder charge. The sentences were to be served consecutively.

Appellant's counsel filed a notice of appeal on October 18, 1993. This court dismissed that appeal on November 17, 1993 as being untimely. In that decision, the court directed appellant's counsel to App.R. 5(A). Appellant also filed a motion for reconsideration that was denied by this court.

Approximately six years later, on October 26, 1999, appellant filed a *pro se* petition to reopen his appeal. This court granted that motion on May 3, 2000, and appointed him counsel.[1] On October 30, 2000, appellant's appointed appellate counsel filed a merit brief. Appellee filed a brief in opposition.

Pursuant to App.R. 26(B)(7), our inquiry is limited to whether appellant's prior appellate counsel was deficient and, if so, whether appellant was prejudiced by that deficiency.

Appellant alleges three assignments of error the first two of which share common issues of legal analysis; therefore, they will be addressed together.

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[1] In addition, on appeal appellant has also moved for an injunction and temporary restraining order to enjoin the prison warden from executing and enforcing certain prison library policies and procedures.

Appellant's first assignment of error states:

> "THE TRIAL COURT ERRED AND EXCEEDED ITS JURISDICTION BY CONVICTING AND SENTENCING MR. AHART FOR AGGRAVATED MURDER WITH CAPITAL SPECIFICATION WITHOUT EMPANELLING TWO ADDITIONAL JUDGES PURSUANT CRIMINAL RULE 11(C) AND OHIO REV. CODE ANN. § 2945.06. T.D. 2, T.P. 2,18."

Appellant's second assignment of error states:

> "THE TRIAL COURT ERRED BY CONVICTING MR. AHART WITHOUT EMPANELLING TWO ADDITIONAL JUDGES IN VIOLATION OF MR. AHART'S STATE-CREATED LIBERTY INTEREST TO A THREE-JUDGE PANEL. T.D. 2, T.P. 2, 18."

Appellant argues that the trial court lacked jurisdiction to accept his guilty plea to aggravated murder because R.C. 2945.06 requires that a three-judge panel, not a single judge, accept a guilty plea when the defendant has been charged with a capital crime. Appellant notes that he was charged with a capital crime and contends that regardless of whether or not appellee chose to pursue the death penalty, since he was charged with an offense punishable by death, the plain language set forth in R.C. 2945.06 required that once he pled guilty, a single judge was either required to dismiss the death penalty specifications or empanel two additional judges to hear his plea.

In response to appellant's argument, appellee argues that since it agreed not to seek the death penalty pursuant to the

plea agreement, the single trial judge did not err in accepting appellant's guilty plea. Appellee argues that these actions effectively removed the instant case from the three-judge panel requirement set forth in R.C. 2945.06.

R.C. 2945.06 provides:

> "If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If 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. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death."

At the time appellant entered his plea, case law interpreting the sentencing provisions of R.C. 2929.03 *et seq*. and R.C. 2945.06 held that once a capital defendant enters a guilty plea in exchange for the prosecution not pursuing the death penalty, it is no longer a capital case within the scope

of 2945.06, and therefore a three-judge panel need not be empanelled to accept the defendant's plea. *State v. Griffin* (1992), 73 Ohio App.3d 546, 553.

Appellant cites to subsequent developments in the case law which he argues support his proposition that the indictment must be amended to delete the death penalty specifications to withdraw the case from the requirements of R.C. 2945.06 and that a plea agreement not to seek the death penalty is not enough.

Assuming *arguendo* that those cases indeed stand for that proposition, appellant's reliance on those cases is misplaced given the posture of appellant's case before this Court. Our review is limited to whether appellant's prior appellate counsel was deficient for not having raised these issues in appellant's direct appeal. At the time of appellant's plea and during the time period subsequent to his conviction when he could have pursued a direct appeal, *Griffin*, *supra*, was the only authority on this issue.[2] Therefore, at that time, there was no argument

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[2] Generally, criminal defendants are not entitled to retroactive application of subsequent developments in the case law which may now be beneficial to them. *Teague v. Lane* (1989), 489 U.S. 288, 310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (plurality opinion). The only two exceptions to the nonretroactivity doctrine set forth in *Teague* are: (1) the new rule places certain kinds of individual conduct beyond lawmakers' authority to proscribe, or (2) it is a "watershed" rule implicating the "fundamental fairness and accuracy of the criminal proceeding." *Lambrix v. Singletary* (1997), 520 U.S. 518, ____, 117 S.Ct. 1517, 1531, 137 L.Ed.2d 771, citing *Teague*, 489 U.S. at 311. The cases cited by

to be made concerning this issue. Appellate counsel's refusal to raise arguments that run counter to existing authority cannot serve as a basis for ineffective assistance of appellate counsel under App.R. 26(B). See *State v. Allen* (1996), 77 Ohio St.3d 172.

In addition, the Fifth District, which decided *Griffin*, has continued, to date, to adhere to its holding. See *State v. Heddlesohn* (Aug. 4, 1997), Stark App. No. CA-00113, unreported (since appellant pled pursuant to negotiated plea agreement wherein the State agreed not to seek death penalty, death penalty procedures need not be followed) and *State v. Rash* (Mar. 27, 1995), Stark App. No. 94-CA-223, unreported, 1995 WL 347945, (three-judge panel not necessary when defendant pleads in exchange for State not seeking death penalty).

The other requirement under App.R. 26(B)(7) is that even if appellant's prior appellate counsel was deficient, appellant had to have been prejudiced by that deficiency. By appellate counsel not making the argument regarding a three-judge panel, appellant was assured that the intended result of his plea agreement would be carried out. One judge as opposed to three could not sentence appellant to death. As a result, we fail to

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appellant do not implicate either of these two exceptions.

see the prejudice of any alleged ineffectiveness of appellate counsel.

Accordingly, appellant's first and second assignments of error are without merit.

Appellant's third assignment of error states:

> "THE TRIAL COURT ERRED WHEN IT CONVICTED AND SENTENCED MR. AHART EVEN THOUGH HE HAD NOT MADE A KNOWING, INTELLIGENT[,] AND VOLUNTARY WAIVER OF HIS RIGHT TO A JURY TRIAL AND HIS RIGHT TO PLEAD NOT GUILTY. T.P. 16-18."

Prior to accepting a guilty plea by a defendant, a trial court is required to follow the dictates of Crim.R. 11(C) which directs the trial judge to inform the defendant of certain matters. *State v. Johnson* (1988), 40 Ohio St.3d 130, 132-33. At the time of appellant's plea, Crim.R. 11(C)(2) provided:

> "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> "(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.
>
> "(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.
>
> "(c) Informing him and determining that he understands that by his plea he is waiving

> his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

Although rigid adherence to Crim.R. 11 is preferred, a court need only substantially comply with the rule in order to effectuate a valid plea. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. Only upon a showing that Crim.R. 11 was not substantially complied with will a reviewing court vacate a guilty plea. *Id*. A trial court will be deemed to have substantially complied with Crim.R. 11 if, under the totality of the circumstances, the defendant knowingly, voluntarily and intelligently entered his plea and subjectively understood the effect of the plea, the rights being waived and the consequences of such. *State v. Stewart* (1977), 51 Ohio St.2d 86.

A review of the transcript from the plea proceedings reveals that the trial court adequately complied with Crim.R. 11 so as to insure that appellant's plea was knowingly, voluntarily, and intelligently entered. After learning of the details of the plea agreement, the trial court judge proceeded to personally address appellant. The judge explained the nature of the charge, the maximum penalty involved, and that appellant would not be eligible for probation. The judge informed

appellant of and determined that appellant understood the effect of his plea of guilty, and that the court upon acceptance of the plea could proceed with judgment and sentence. The judge informed appellant that by his plea he was waiving his rights to a jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself. Throughout this discussion appellant repeatedly acknowledged that he understood what was being explained to him.

When the judge indicated to appellant that he would accept the plea bargain and asked him if he wished to plead at that time appellant responded, "Not guilty." (Tr. 16.) Appellant argues that this proved that he never plead guilty to the charges and that, if he did, it was not voluntary.

After appellant's initial not guilty response, appellant's trial counsel proceeded to clarify and explain on the record each of the charges and separately indicated appellant's guilty plea to each of those charges. When asked if those were his pleas, appellant responded, "Yes, sir." (Tr. 18.)

Appellant's argument that his plea was not voluntary in this regard is without merit. "Notably, Crim.R. 11 does not require that the defendant himself must orally give his plea to

the trial court, thereby not prohibiting the defendant's counsel from orally entering the plea, as long as the remainder of Crim.R. 11 is complied with." *State v. Nathan* (1995), 99 Ohio App.3d 722, 725-726. See, also, *State v. Keaton* (Jan. 14, 2000), Clark App. No. 98 CA 99, unreported, 2000 WL 20850 at *5; *State v. Schellenger* (Sept. 27, 1996), Clark App. No. 95-CA-91, unreported, 1996 WL 562809 at *3.

Because of his initial not guilty response, appellant also argues that the trial court erred in failing to conduct an *Alford* inquiry.

In *North Carolina v. Alford* (1970), 400 U.S. 25, the defendant, who protested his innocence, entered a guilty plea to avoid the death penalty. In such a case, there must be a strong factual basis for the plea on the record. In this case, appellant did not enter an *Alford* plea. Appellant never protested his innocence. The confusion concerning his initial response to the trial court's inquiry was cleared up by his trial counsel and appellant ultimately affirmed his guilty plea to each of the charges.

In sum, under the totality of the circumstances, the trial court substantially complied with Crim.R. 11 and adequately insured that appellant knowingly, voluntarily, and intelligently entered his plea and subjectively understood the effect of the

plea, the rights being waived and the consequences of such. In addition, appellant signed a written plea setting forth in detail the charges, the sentences for each, and all of the provisions contained in Crim.R. 11(C)(2). While not sufficient by itself, appellant's written plea is just further proof that appellant knowingly, voluntarily, and intelligently entered his plea.

Accordingly, appellant's third assignment is without merit.

As indicated earlier, on November 20, 2000, appellant filed a motion with this court styled, "MOTION FOR PROHIBITORY INJUNCTION OR TEMPORARY RESTRAINING ORDER." In it, he names as respondents Warden Julius Wilson, Deputy Warden of Administration Melinda Howard, Major Coleman, and UMA (Unit Manager) Andrea Carroll. Appellant alleges that the respondents are denying him access to the courts. Specifically, he alleges that respondents are "implementing a practice of taking away expedient and swift access to all copied legal documents, legal copies of cases of authority, legal motions, and the unnecessary as well as illegal delay and even in most cases the total prevention of timely mailing of legal documents for presentation to the courts."

The courts of appeals have original jurisdiction over the following: quo warranto, mandamus, habeas corpus, prohibition,

procedendo, and in any cause on review as may be necessary to its complete determination. Section 3(B)(1)(a)-(f), Article IV, Ohio Constitution. The courts of appeals do not have jurisdiction to issue injunctions or restraining orders. See *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, paragraph four of the syllabus; *State ex rel. Sowder v. City of Cincinnati* (1968), 17 Ohio App.2d 84, 86; *State ex rel. Cullinan v. Board of Elections of Portage County* (1968), 28 Ohio App.2d 281, 281-282; *State ex rel. Hilton v. Board of Commrs. of Warren County* (1968), 16 Ohio App.2d 118, 121-122. Even if appellant's motion could be construed as an action in mandamus, this court would be the improper venue for such a case. Appellant is currently incarcerated in a state correctional facility located in Leavittsburg, Ohio. Each of the officials named as respondents by appellant are located and each act sought to be compelled would be performed in Trumbull County, which is outside the area covered by this appellate district. The proper venue for such an action would be the Eleventh District Court of Appeals.

Accordingly, appellant's "MOTION FOR PROHIBITORY INJUNCTION OR TEMPORARY RESTRAINING ORDER" is overruled and the cause dismissed.

To summarize our disposition of this case, we find that appellant has failed to demonstrate that his prior appellate counsel was ineffective for having failed to raise the foregoing assignments of error. The judgment of the trial court and appellant's conviction is hereby affirmed. In addition, appellant's "MOTION FOR PROHIBITORY INJUNCTION OR TEMPORARY RESTRAINING ORDER" is overruled and that cause is hereby dismissed.

Vukovich, J., concurs
DeGenaro, J., dissents; see dissenting opinion

DeGenaro, J., dissenting:

As I disagree with the majority's analysis with respect to the procedural posture of this case and it's resolution of the merits, particularly as the central issue in this appeal has been certified to the Supreme Court, I must respectfully dissent.

The proper procedural posture of this matter is a delayed appeal pursuant to App.R. 5, rather than a reopened appeal pursuant to App.R. 26. This distinction in important for, as correctly noted by the majority, our review of the assigned errors within the context of whether or not appellate counsel was ineffective as dictated by App.R. 26, is a distinctly different standard of review than that applied to a direct appeal.

On November 5, 1993, trial counsel filed a motion to appoint appellate counsel, which this court deemed moot by virtue of a prior order dismissing the appeal. On October 26, 1999 Ahart moved, this time *pro se,* for the appointment of counsel, in addition to reopening the appeal, which we sustained.

Despite the fact that Ahart's appeal was untimely pursuant to App.R. 4(A), he was still able to avail himself of being granted a direct appeal pursuant to App.R. 5(A). It was erroneous for this court to fail to appoint appellate counsel back in 1993 who could then process a request for a delayed appeal, which this court twice directed trial counsel to do, as:

> "[a] defendant charged with a serious offense, who is unable to obtain counsel, is entitled to assigned counsel at every stage of the proceedings through appeal as of right * * *." *State v. Gentry* (1983), 10 Ohio App.3d 227, 228.

At oral argument on the merits, we requested appointed counsel and the state to brief the issue of the procedural

posture of this case. As argued by appointed counsel on behalf of Ahart, although inmates must follow procedural and substantive laws, appellate courts are obligated to provide some leeway to *pro se* litigants and not dismiss claims for inartfully crafted filings. *Akbar-el v. Muhammed* (1995), 105 App.3d 81. That being the case, although Ahart requested a delayed appeal pursuant to App.R. 5 in the body of his contra-brief to the state's opposition to his motion for reopening an appeal, his request for a delayed appeal met the requirements of App.R. 5(A). And again, had this court appointed appellate counsel in 1993 as required by *Gentry*, the motion for delayed appeal would have been presented in a more technically correct manner. Moreover, as a practical matter, it is impossible to reopen an appeal that technically was never filed.

With regards to the merits of this appeal, R.C. 2945.06 clearly provides in part:

> "If the accused is charged with an offense punishable by death * * * [and] if the accused pleads guilty to 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. The court **shall** follow the procedures contained in Sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is **charged with an offense punishable by death**."

In regard to statutory construction, "[i]f the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545. "A statute is ambiguous when its language is subject to more than one reasonable interpretation." *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 274. The statutory language at issue in this case is clear. Although the

prosecution agreed not to pursue a death sentence, the indictment was not amended, and Ahart was still charged with an offense punishable by death. The majority and the Fifth District failed to follow this rule of statutory construction. Conversely, I believe the Eighth District applied proper statutory construction in reaching its decision in *State v. Parker* (February 22, 2001), Cuyahoga App. No. 76395, unreported, which involves the identical fact pattern which is before us.

In *Parker,* the Eighth District vacated the plea and remanded that case because the prosecution failed to amend the indictment and a single judge accepted the defendant's guilty plea. Relying on one of its previous decisions, the Eighth District reasoned that because the prosecution merely agreed not to pursue a death sentence, rather than amending the indictment to remove the death penalty specifications, the proceedings did not fall within the exception of *State ex rel. Henry v. McMonagle*,(2000), 87 Ohio St.3d 543, in which the Supreme Court held that where death penalty specifications are deleted, the trial court does not need to follow the procedures in R.C. 2945.06, and Parker should have entered his plea before a three judge panel, as he was still charged with an offense punishable by death.

In light of the above, I am inclined to follow the decision of the Eighth District in *Parker*. However, the better course in this case would be to refrain from addressing the issue, as it is presently pending before the Supreme Court in consolidated appeals.

The Ohio Supreme Court has accepted the Eighth District's certification of the following question:

> Whether when the state agrees not to pursue the death penalty in an aggravated murder case, but does not delete the death penalty specification, does the requirement that the proceedings be held by a three judge panel

> as set forth in R.C. 2945.06 and Crim.R. 11(C)(3) still apply. *State v. Parker* (2001),___ Ohio St.3d __,751 N.E.2d 485.

The Ohio Supreme Court will also be resolving the converse of this issue, as the state appealed the Eighth District's decision:

> "The state's commitment not to seek the death penalty in a capital case plea agreement is equivalent to a deletion of the death penalty specification, since the accused cannot be punishable by death." *State v. Parker* (2001), 92 Ohio St.3d 1447.

Accordingly, the more prudent course would be stay resolution of this issue before us pending a resolution by the Ohio Supreme Court of the above issues.