[Cite as *State v. Bender*, 2023-Ohio-4737.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

WILLIAM HERBERT BENDER, II,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 BE 0012

Criminal Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 22 CR 217

BEFORE:
Mark A. Hanni, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. J. Kevin Flanagan, Belmont County Prosecutor and *Atty. Jacob A. Manning*, Assistant Prosecuting Attorney, Belmont County Prosecutor's Office, for Plaintiff-Appellee and

Atty. Michael A. Partlow, for Defendant-Appellant.

Dated: December 20, 2023

HANNI, J.

{¶1} Defendant-Appellant, William Herbert Bender, II, appeals from a Belmont County Court of Common Pleas judgment denying his motion to withdraw his guilty plea. For the following reasons, we affirm the trial court's judgment.

{¶2} On September 8, 2022, Appellant was indicted by the Belmont County Grand Jury for trafficking in cocaine, a second-degree felony in violation of R.C. 2925.03(A)(1) and (C)(4)(D), with a forfeiture specification. Appellant failed to appear for a plea agreement deadline hearing, and his bond was revoked. However, it was reinstated after a hearing.

{¶3} Trial was scheduled for January 24, 2023. On January 23, 2023, the trial court issued a journal entry indicating that the assistant prosecutor called the court to state that the parties reached a plea agreement and were on their way to court for the hearing. The plea hearing was held, and the court engaged in a colloquy with Appellant. Defense counsel and the assistant prosecutor were present.

{¶4} After the colloquy, the court indicated its intention to revoke Appellant's bond and remand him to jail. (Plea Tr. at 20). The assistant prosecutor and defense counsel stated their agreement to continue Appellant's bond pending sentencing. (Plea Tr. at 20-21). Defense counsel explained that Appellant was not prepared to immediately go to jail since the parties had just reached the plea agreement an hour-and-a-half earlier and they had agreed that he could remain on bond. (Plea Tr. at 21). The court nevertheless revoked Appellant's bond, explaining that the charge carried a mandatory prison sentence. (Plea Tr. at 22).

{¶5} In its January 26, 2023 entry, the court stated that the plea hearing was held on January 23, 2023, and Appellant was informed of his rights and the waiver of those rights upon pleading guilty. The court then found that Appellant entered the guilty plea knowingly, intelligently, and voluntarily.

{¶6} The trial court sentenced Appellant on February 6, 2023. Appellant appeared by video from the Justice Center. (Sent. Tr. at 3). The court set forth the recommended sentence and heard statements from the parties. Defense counsel indicated that Appellant had a diagnosis of bipolar disorder and mental health issues, which should go toward sentence mitigation. (Sent. Tr. at 7).

{¶7} When the court asked Appellant if he wished to speak, he stated that from the beginning of the case, "the presumption of innocence" was taken away from him. (Sent. Tr. at 13). He stated that he turned himself in, spoke to a detective, and retained a bond. (Sent. Tr. at 14). He began discussing his changes in counsel, but upon redirection, he stated that he did not recall signing the plea agreement. (Sent. Tr. at 15). He stated that he had not had his medication in a while and he was attending therapy for his post-traumatic stress disorder. (Sent. Tr. at 15). He explained:

> I don't remember - - the last thing I have to say, I'd like to speak to make a record for an appealable issue grounds; ineffective assistance of counsel. I don't remember saying I was guilty. I'm here asking - - handcuffed. I don't have a pen.

(Sent. Tr. at 15). Appellant said he did not know what else to say. (Sent. Tr. at 15).

{¶8} The court reviewed the sentencing factors and sentenced Appellant to a mandatory minimum of four years and a maximum term of six years in prison. (Sent. Tr. at 19). The court also imposed a two-year driver's license suspension, waived the fine, and informed Appellant of post-release control. (Sent. Tr. at 19).

{¶9} Appellant then told the court that he did not get a fair trial, and he wanted to "take it back." (Sent. Tr. at 23). He repeated that he wanted to make a record for appeal for ineffective assistance of counsel. (Sent. Tr. at 24). He stated:

> If I may proceed to speak on my behalf, and appease the Court with what I formally, legal and constitutionally need to address to the Courts regarding a basis of, and in the interest of justice, ineffective assistance of counsel.
>
> I have the right to object while going on formal record and ask for a change of pace, that did not and failed to apprise and inform me of the terms and conditions of the guilty plea, that is to an admission of guilt, the definition of waiving my right - - to permanently waive my rights to have the Court take any evidence as to my guilt or not guilty concern in these offenses; again, Your Honor, according regarding to the basis and interest of justice,

> granting ineffective assistance counsel. I didn't get a fair trial. You're sending me to prison, and there is nothing I can do.

(Sent. Tr. at 24-25).

{¶10} The court stated that it was not disputing Appellant's statements, but those were issues to argue on appeal. (Sent. Tr. at 25).

{¶11} The sentencing transcript reflects that Appellant became emotional to the point that his statements became unintelligible and the sheriff's deputy who was with Appellant called his name and told him to calm down. (Sent. Tr. at 25-26). Defense counsel moved to withdraw from the case due to the ineffectiveness of counsel allegation and the court granted the motion. (Sent. Tr. at 26).

{¶12} On February 8, 2023, the court issued its entry sentencing Appellant to a mandatory minimum term of four years in prison and a maximum term of six years in prison, with 20 days credited for time served, a waiver of fines, a two-year driver's license suspension, and post-release control.

{¶13} On February 9, 2023, Appellant filed a pro se motion to withdraw his guilty plea. He stated that while he entered a guilty plea to the charges, he received the ineffective assistance of counsel because counsel failed to familiarize himself with Appellant's mental diagnosis. He contended that counsel failed to examine the record or consult with him about his bipolar disorder, mood swings, anxiety, post-traumatic stress disorder, and racing and disorganized thoughts. He asserted that counsel should have assessed if a mental evaluation was necessary and whether a pre-trial motion should have been discussed or made concerning his mental diagnoses prior to accepting the plea offer. Appellant related that he was unable to sufficiently discuss the plea terms with his counsel, counsel failed to discuss the terms with him, and he made several attempts to communicate with counsel.

{¶14} On February 15, 2023, Appellant pro se, filed a "post-verdict motion" where he moved to withdraw his guilty plea. He stated that the court overlooked vital information and reports without a presentence evaluation of his competency to enter a guilty plea. He also asserted that the court committed a sentencing error by focusing on retribution and incapacitation and failed to consider rehabilitation. He filed a supplemental brief.

{¶15} On March 3, 2023, the trial court overruled Appellant's motions. In its judgment entry, the court cited Crim. R. 23 and caselaw confirming that pre-sentence motions to withdraw guilty pleas are accepted, but post-sentence requests to withdraw a plea are granted only to correct manifest injustice. The court held that Appellant failed to show manifest injustice resulting from his guilty plea. The court detailed its findings made during the plea colloquy and its finding that Appellant entered his guilty plea knowingly, intelligently, and voluntarily. The court also noted that Appellant signed the plea agreement, which detailed the plea and its terms and conditions.

{¶16} The court held that Appellant's plea colloquy rebutted his allegation of ineffective assistance of counsel because Appellant affirmed during the plea hearing that his counsel had explained to him everything relating to the plea agreement. The court also noted that neither Appellant nor his counsel requested that the plea be withdrawn. The court also addressed Appellant's alleged sentencing errors.

{¶17} On March 7, 2023, Appellant, through appointed counsel, filed a timely notice of appeal and raises two assignments of error.

{¶18} In his first assignment of error, appellant asserts:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

{¶19} Appellant asserts that the trial court erred by treating his request to withdraw his guilty plea as a post-sentencing request, rather than a pre-sentence request. Appellant indicates that his motion was drafted and mailed from the jail prior to sentencing and he had reiterated his request to withdraw his plea at the sentencing.

{¶20} Appellant cites *State v. Xie*, 62 Ohio St.3d 521, 584 N.E.2d 715 (1992), and states that motions to withdraw guilty pleas should be construed liberally. He also cites *City of Cleveland v. Wells*, 8th Dist. Cuyahoga No. 111494, 2023-Ohio-1666, for support that even if a trial court fully complies with Crim. R. 32.1, a guilty plea may nevertheless be found not knowingly or voluntarily made.

{¶21} Appellant asserts that the court should have found that his motion to withdraw his guilty plea was made pre-sentence. He contends that he did not recall making the plea and he had been off of his medication during the relevant time period.

He submits that the trial court should have allowed him to withdraw his plea under either the pre-sentence or post-sentence standards.

{¶22} Crim.R. 32.1 governs guilty plea withdrawals and provides: "A motion to withdraw a plea of guilty or no contest 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 the defendant to withdraw his or her plea." This rule establishes a fairly strict standard for deciding a post-sentence motion to withdraw a guilty plea but provides no guidelines for deciding a presentence motion. *State v. Xie*, 62 Ohio St.3d at 526, 584 N.E.2d 715.

{¶23} A decision on a presentence plea withdrawal motion is within the trial court's sound discretion. *Id.* at 526. Therefore, we will not reverse the trial court's decision absent an abuse of discretion. Abuse of discretion means that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶24} The Ohio Supreme Court recognizes that presentence motions to withdraw guilty pleas should be "freely and liberally" granted. *Xie, supra*, at 527. However, the Court also recognizes that a "defendant does not have an absolute right to withdraw a plea prior to sentencing." *Id*. This Court has adopted nine factors to weigh in considering a presentence motion to withdraw a plea. *State v. Thomas*, 7th Dist. Mahoning Nos. 96 CA 223, 96 CA 225, 96 CA 226, 1998 WL 934645 (Dec. 17, 1998), citing *State v. Fish*, 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995). Consideration of the factors is a balancing test and no one factor is conclusive. *Id.*

{¶25} The defendant bears the burden of establishing the existence of a manifest injustice for a post-sentence motion to withdraw a guilty plea. *State v. Smith*, 49 Ohio St.2d 261, 264, 361 N.E.2d 1324, (1977). A defendant can only establish a manifest injustice in "extraordinary cases." *Id*. at 264. A manifest injustice has been defined by the Supreme Court as a "clear or openly unjust act." *State ex rel. Schneider v. Kreiner*, 83 Ohio St.3d 203, 208, 699 N.E.2d 83, (1998). Manifest injustice has been defined by this Court as "an extraordinary and fundamental flaw in the plea proceedings." *State v. Lintner*, 7th Dist. Carroll No. 732, 2001-Ohio-3360, citing *Smith, supra*.

{¶26} A trial court must conduct an evidentiary hearing on a presentence motion to withdraw a guilty plea in order to determine whether a reasonable and legitimate basis exists for withdrawing the plea. *Xie,* 62 Ohio St.3d at 526, 584 N.E.2d 715. However, a trial court is not required to hold an evidentiary hearing on every post-sentence motion to withdraw a plea. "The movant must establish a reasonable likelihood that withdrawal of his plea is necessary to correct a manifest injustice before a trial court must hold a hearing on his motion." *State v. Baker*, 2018-Ohio-669, 105 N.E.3d 1271, ¶ 13 (2d Dist.), quoting *State v. Stewart*, 2d Dist. Greene No. 2002-CA-28, 2004-Ohio-3574, ¶ 6.

{¶27} The trial court here determined that Appellant's motions were post-sentence motions. The court found that Appellant's first motion to withdraw his guilty plea was filed on February 9, 2023 and his second was filed on February 15, 2023. This is in accord with the Third District Court of Appeals holding in *State v. Shoulders,* 3d Dist. Hancock Nos. 5-13-12, 5-13-20, 2014-Ohio-435. There, the defendant's pro se motion to withdraw his guilty plea was dated March 20, 2013 and filed on March 28, 2013. The trial court sentenced the defendant on March 20, 2013 and filed its sentencing entry on March 22, 2013. The defendant asserted that his motion to withdraw was filed before his sentencing since it was dated March 20, 2013 and the trial court's sentence was not effective until its entry on March 22, 2013.

{¶28} Quoting Crim. R. 12(B), the Third District held that, "even assuming the trial court's judgment entry of conviction and sentence was not effective until March 22, 2013, Shoulders' motion was filed six days after it and, therefore, was a post-sentence motion to withdraw his guilty plea." *Id*. at ¶ 22. Crim.R. 12 refers to pleadings and motions made before trial. Crim. R. 12(B) provides that "[t]he filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court."

{¶29} Applying *Shoulders* we find that the trial court in the instant case did not err by treating Appellant's first motion to withdraw his guilty plea as filed post-sentence. The motion was filed on February 9, 2023, one day after the trial court's sentencing entry was filed. The second motion was filed on February 15, 2023, and was also a post-sentence motion. Thus, we apply the manifest injustice standard.

{¶30} Appellant does not meet the heavy burden of establishing manifest injustice. The trial court specifically informed Appellant of each of his rights and the rights that he

was waiving by entering a guilty plea. The court informed Appellant that by pleading guilty, he was making a complete admission to the elements of the crime. (Plea Tr. at 5). When the court asked if Appellant understood this, Appellant responded, "Yes, sir." (Plea Tr. at 5). The court asked if Appellant was under the influence of any substance that would interfere with his ability to understand. (Plea Tr. at 7). Appellant responded, "No, sir." (Plea Tr. at 7). He stated that he was pleading guilty voluntarily, he was not threatened or coerced, and he understood what was happening. (Plea Tr. at 7).

{¶31} The court asked Appellant if he understood that he had a right to a jury trial. (Plea Tr. at 13). Appellant responded, "yes" and affirmed that he was waiving his right to a jury trial. (Plea Tr. at 13). The trial court asked if Appellant understood that he was presumed innocent and the State would have to prove each and every element of the crimes beyond a reasonable doubt in order to prove Appellant guilty beyond a reasonable doubt. (Plea Tr. at 14). Appellant responded "yes, sir" when asked if he understood his rights and his waiver of those rights by pleading guilty. (Plea Tr. at 14-15). Appellant responded "yes, sir" when the court asked if he understood his rights to cross-examine witnesses at a trial, with his counsel, and the compulsory process of the court, and the waiver of those rights. (Plea Tr. at 14). He answered the same when asked if he understood that he could not be forced to testify and a jury could not use that as evidence of his guilt. (Plea Tr. at 15). He stated that he understood that he was waiving this right by pleading guilty. (Plea Tr. at 15).

{¶32} The court asked if Appellant's counsel had reviewed the terms and conditions of the plea agreement with him and Appellant affirmed that he had. (Plea Tr. at 11). The court did not ask Appellant if he was satisfied with his counsel's representation. However, Appellant did not state that he had any trouble with his counsel at that time.

{¶33} Based upon the plea transcript, we do not find that a "clear or openly unjust act" occurred. There is no indication that Appellant did not understand his rights and waiver thereof upon pleading guilty. The record shows no indication of behavioral issues or other evidence of lack of understanding, consent, or capacity by Appellant.

{¶34} Further, it was not until the sentencing hearing when Appellant stated that he had not been given his medications. Appellant was out on bond before his plea hearing and was not taken into custody until after that hearing.

{¶35} In addition, at the sentencing, Appellant does not inform the court that he had filed a motion to withdraw his guilty plea. When asked if he wanted to make a statement, Appellant stated that he did not remember stating that he was guilty. (Sent. Tr. at 15). He stated that he wanted to make a record for appeal on the basis of ineffective assistance of counsel. (Sent. Tr. at 15). After the court imposes its sentence, Appellant then stated "[l]et me take it back." (Sent. Tr. at 23). Appellant asserts that he was not informed of the terms and conditions of the guilty plea and he wished to object. (Sent. Tr. at 24). However, the plea hearing demonstrates otherwise. The plea agreement, signed by Appellant and his counsel, also sets forth all of Appellant's rights and the waiver of those rights, informs him of the charge and the possible penalties, and states that by pleading guilty, Appellant is admitting that he committed the offense.

{¶36} For these reasons, we find that there is no "extraordinary and fundamental flaw in the plea proceedings" and manifest injustice has not occurred.

{¶37} Accordingly, Appellant's first assignment of error lacks merit and is overruled.

{¶38} In his second assignment of error, appellant asserts:

> **APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS IN THAT REGARD**.

{¶39} Appellant recognizes the Ohio Supreme Court's ruling in *State v. Gaines*, 11th Dist. Trumbull No. 2015-T-0061, 2016-Ohio-1312, that in order to establish an ineffective assistance of counsel claim on appeal, an appellant must show that counsel's performance was deficient and prejudice arose from that performance. Appellant also acknowledges that generally, counsel's performance is presumed to be within the broad range of professional assistance.

{¶40} Appellant contends that his counsel was ineffective because "he had a duty to at least attempt to assist Appellant in withdrawing his guilty plea once counsel became

aware of Appellant's desire for such at the sentencing hearing." He also alleges that his counsel knew that Appellant did not knowingly or voluntarily enter the plea since he stated at the sentencing hearing that he did not recall making the plea.

{¶41} Ineffective assistance of counsel may serve as a basis for a motion to withdraw a guilty plea under Crim. R. 32.1. *See State v. Creech*, 7th Dist. Jefferson No. 21 JE 0001, 2021-Ohio-3020, ¶ 17 (citing cases). A claim of ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the performance was not deficient, then there is no need to review for prejudice. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). The contrary is also true.

{¶42} To show deficient performance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), citing *Strickland*, 466 U.S. at 687-689. Our review is highly deferential to counsel's decisions because of the strong presumption that counsel's conduct fell within the wide range of what would be considered reasonable professional assistance. *Id.* There are "countless ways to provide effective assistance in any given case." *Id.*

{¶43} As to prejudice, a lawyer's errors must be so serious that a reasonable probability exists that the result of the proceedings would have been different. *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995). Lesser prejudice tests have been rejected: "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142, fn. 1, quoting *Strickland*, 466 U.S. at 693. Prejudice justifies reversal only where the results were unreliable, or the proceeding was fundamentally unfair due to the performance of trial counsel. *Carter*, 72 Ohio St.3d at 558, citing *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

{¶44} Appellant's brief asserts that counsel was ineffective by failing to assist him in withdrawing his guilty plea at the sentencing hearing. He also asserts that counsel was ineffective because "it would appear that counsel was well aware that Appellant had not entered the plea on a knowing and voluntary basis since Appellant quite specifically

stated that he could not even recall making the plea." He concludes that the "record is quite clear that trial counsel did nothing to assist Appellant in this regard."

{¶45} In his first motion to withdraw his guilty plea, Appellant complained that counsel was ineffective for failing to familiarize himself with Appellant's mental diagnoses when they consulted and he failed to assess whether a mental evaluation was necessary. He further asserted that counsel failed to consult with him as to whether to enter a guilty plea, the evidence to present or witnesses to call, whether to have a jury trial, and the substance of their strategy and tactical decisions.

{¶46} In his second motion, Appellant presented no assertions of the ineffectiveness of counsel. He alleged only trial court sentencing errors.

{¶47} The plea colloquy transcript shows no indication that Appellant was unable or incapable of understanding the plea, or that he misunderstood anything, could not respond, or could not focus. The trial court explained each of Appellant's constitutional rights and informed Appellant of his waiver of each right upon pleading guilty. The court asked Appellant if he understood each right, Appellant responded that he did, and he affirmed that counsel reviewed the evidence with him, the plea and its terms, and he affirmed that counsel answered all of his questions. (Plea Tr. at 11).

{¶48} After noting on the record that the State and defense counsel had negotiated a plea agreement, and after affirming their understanding as to the terms, the court asked Appellant if he was entering a guilty plea to the charge as indicted. (Plea Tr. at 4). Appellant stated, "Yes. Yes, sir." (Plea Tr. at 4). The court asked Appellant to state his plea, and Appellant stated, "Guilty." (Plea Tr. at 4).

{¶49} Upon informing Appellant of his rights and the waiver of those rights with a guilty plea, the court specifically asked Appellant if he had any questions of the court. (Plea Tr. at 5-16). Appellant asked if he would be able to make a statement at the sentencing. (Plea Tr. at 16). The court responded that he could and his counsel explained that a presentation would be made at sentencing, which included a statement by Appellant. (Plea Tr. at 16-17). The court asked Appellant if he read all of the terms and conditions of the plea agreement, Appellant responded that he had, and the court ensured that Appellant had signed the agreement. (Plea Tr. at 16-17). Nothing in the

record of the plea hearing established that Appellant made an involuntary, unintelligent, or unknowing plea.

{¶50} Appellant relies upon the statements that he made at the sentencing hearing to assert the ineffectiveness of his counsel at the plea hearing. He submits that at the sentencing, he stated that he did not recall pleading guilty, he was seeing doctors for his mental health diagnoses, and he wanted to "take it back." (Sent. Tr. at 15-19). However, these statements cannot serve as a basis for asserting the ineffectiveness of counsel at the plea hearing which actually preceded it.

{¶51} Moreover, Appellant's counsel informed the court on the record of Appellant's bipolar disorder and mental health issues at the sentencing hearing. Counsel stated that this should go toward mitigation of the sentence. (Sent. Tr. at 7). Thus, Appellant's counsel was aware of Appellant's mental health issues and did not believe them to be a barrier to going forward with sentencing or to be an issue barring the guilty plea already made.

{¶52} To the extent that Appellant asserts that his counsel should have helped him withdraw his plea at the sentencing hearing, this assertion is also without merit. Appellant has not shown that the court would have granted him permission to withdraw his guilty plea at the sentencing hearing, even if counsel attempted to assist him.

{¶53} The fact that Appellant had diagnosed mental health conditions does not negate a guilty plea. *State v. Carson*, 8th Dist. Cuyahoga No. 109592, 2021-Ohio-209, ¶ 12. Counsel's failure to request a mental evaluation or inform the court of Appellant's diagnoses at the plea hearing does not automatically constitute the ineffective assistance of counsel. The Eighth District Court of Appeals held in *Carson*, *supra* that:

> [I]t is well established, however, that a defendant does not lack mental capacity to enter a plea, or that a trial court does not err in accepting a plea, merely because a defendant was suffering from a mental illness or was taking psychotropic medication when he entered the plea.

{¶54} Again, to underscore, a defendant is not incompetent to plead guilty solely because he suffers from a mental illness. *State v. D-Bey*, 8th Dist. Cuyahoga No. 109000, 2021-Ohio-60, ¶ 41, citing *State v. McMillan,* 2017-Ohio-8872, 100 N.E.3d 1222, ¶ 29

(8th Dist.), citing *State v. Calabrese,* 8th Dist. Cuyahoga No. 104151, 2017-Ohio-7316, ¶ 16, *State v. Knight*, 8th Dist. Cuyahoga No. 109302, 2021-Ohio-3674, ¶ 30.

{¶55} Upon review of the record, Appellant cannot establish an ineffective assistance of counsel claim. Accordingly, Appellant's second assignment of error lacks merit and is overruled.

{¶56} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

D'Apolito, P.J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.