

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 113308
 v. :
 :
 TA'VON BERKLEY, :
 :
 Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 19, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-676501-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Carson Strang, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *for appellant*.

LISA B. FORBES, J.:

{¶ 1} Ta'von Berkley ("Berkley") appeals his convictions following a guilty plea to felonious assault, a violation of R.C. 2903.11(A)(1), and having weapons while

under disability, a violation of R.C. 2923.13(A)(2). After reviewing the facts of the case and pertinent law, we affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 2} On December 1, 2022, Berkley was indicted in Cuyahoga C.P. No. CR-22-676501-A. He was charged in an eight-count indictment:

Count 1 — Murder, an unclassified felony in violation of R.C. 2903.02(B);

Count 2 — Murder, an unclassified felony in violation of R.C. 2903.02(B);

Count 3 — Involuntary Manslaughter, a felony of the first degree in violation of R.C. 2903.04(A);

Count 4 — Involuntary Manslaughter, a felony of the first degree in violation of R.C. 2903.04(A);

Count 5 — Felonious Assault, a felony of the second degree in violation of R.C. 2903.11(A)(2);

Count 6 — Discharge of Firearm on or Near Prohibited Premises, a felony of the third degree in violation of R.C. 2923.162(A)(3);

Count 7 — Having Weapons While Under Disability, a felony of the third degree in violation of R.C. 2923.13(A)(2); and

Count 8 — Having Weapons While Under Disability, a felony of the third degree in violation of R.C. 2923.13(A)(3).

Counts 1 through 6 were each accompanied by a one-year firearm specification under R.C. 2941.141(A) and a three-year firearm specification under R.C. 2941.145(A).

{¶ 3} On June 5, 2023, Berkley pled guilty to Count 1 — amended to attempted felonious assault, a third-degree felony in violation of R.C. 2923.02 and 2903.11(A)(1), and to Count 7, as indicted, having weapons while under disability, a third-degree felony in violation of R.C. 2923.13(A)(3). The one- and three-year firearm specifications for Count 1 were deleted, and Counts 2, 3, 4, 5, 6, and 8 were nolleed.

{¶ 4} At Berkley's plea hearing, prior to accepting his guilty plea, the trial court explained to Berkley that, in exchange for his guilty plea, the State would amend Count 1 from murder to attempted felonious assault and drop the gun specifications. The trial court also explained to Berkley that he would be pleading guilty to Count 7 as indicted. The trial court explained to Berkley the constitutional rights he would be giving up if he pled guilty, as well as the penalties and possible prison sentences for both counts. When asked how he would like to plead, Berkley responded:

THE DEFENDANT: I would like to plead guilty to felonious assault, attempted.

THE COURT: Okay.

THE DEFENDANT: And weapons under disability.

THE COURT: Okay. Well, just based on what you said, I believe that you clearly understood the plea agreement. Thank you.

...

THE COURT: These offenses occurred in Cuyahoga County, Ohio on July 4th of 2018. Count One has been amended to attempted felonious [assault], in violation of 2923.02, 2903.11(A)(1). Mr. Berkley, how do you plead that you unlawfully did attempt to knowingly cause serious physical harm to Patrick Donald?

THE DEFENDANT: Yes, Your Honor.

THE COURT: It's a felony of the third degree punishable as previously outlined, what's your plea?

THE DEFENDANT: Guilty.

THE COURT: Thank you. And moving on to Count Seven, a violation of 2923.13(A)(2), how do you plead that you unlawfully did knowingly acquire, have, carry, or use any firearm or dangerous ordnance, and

you were under indictment for or convicted of any felony offense of violence; to wit, on September 11, 2018, in Cuyahoga County Common Pleas Court, case number 620215, you were indicted for or convicted of a case a violation of 2921.34(A)(1) of the state of Ohio. How do you plead to this felony three punishable as previously outlined?

THE DEFENDANT: Guilty.

At no point did the trial court ask Berkley if he waived indictment to the amended Count 1. At no point did Berkley object to the amended indictment.

{¶ 5} On July 17, 2023, Berkley was sentenced to a total of six years in prison, consisting of three years for each count to be served consecutively.

{¶ 6} Berkley now appeals, raising one assignment of error for our review:

The trial court erred when it accepted appellant's guilty plea to count 1 without ascertaining whether he was waiving his right to indictment on the amended count.

II. Law and Analysis

A. Berkley's Guilty Plea to the Amended Indictment

{¶ 7} In his assignment of error, Berkley argues that the trial court plainly erred when it accepted his guilty plea to the amended Count 1 without a waiver of indictment. We disagree.

{¶ 8} Berkley was originally indicted in Count 1 for murder, in violation of R.C. 2903.02(B), which provides, "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code." With amended Count 1, Berkley pled guilty to attempted felonious assault under R.C. 2923.02 and 2903.11(A)(1).

R.C. 2903.11(A)(1) provides, “No person shall knowingly. . . Cause serious physical harm to another or to another’s unborn.”

{¶ 9} The Ohio Supreme Court addressed a similar issue in *State v. Rohrbaugh*, 2010-Ohio-3286, ¶ 4, where it answered the certified question: “May a defendant consent to a negotiated plea to an offense that was neither indicted nor a lesser included offense of the indicted offense, without a waiver of indictment pursuant to Crim.R. 7(A) and Section 10, Article I of the Ohio Constitution?” *Id.* at ¶ 4. The Supreme Court held, “[A] defendant may plead guilty to an indictment that was amended to change the name or identity of the charged crime when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change.” *Id.* at ¶ 1.

{¶ 10} The Ohio Const., art. I, § 10, provides in pertinent part, “[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury” Crim.R. 7(A) states that all felonies, other than those punishable by death or life imprisonment, “shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and of the defendant’s right to indictment, the defendant may waive that right in writing and in open court.” Also of significance to this analysis is Crim.R. 7(D), which provides that the court may amend the indictment “provided no change is made in the name or identity of the crime charged.” We note that Crim.R. 7(D) does not provide that amended indictments must be presented to the grand jury.

{¶ 11} In *Rohrbaugh*, the defendant was charged in an eight-count indictment. Each of the charges alleged violations of felonies not punishable by death or life imprisonment. After plea negotiations, the defendant entered a plea of guilty to one count as indicted and one count as amended, with the remaining charges dismissed.

{¶ 12} The Ohio Supreme Court concluded that the “trial court erred because the amendment to the indictment changed the name or identity of the crime charged in count one” in violation of Crim.R. 7(D). *Id.* at ¶ 8. However, Rohrbaugh was not prejudiced by the amended indictment because “he gained a benefit when the prosecution dismissed six charges against him.” *Id.* at ¶ 9. Consequently, the Court found no reversible error. The *Rohrbaugh* Court went on to note that Rohrbaugh “cannot take advantage of an error that he invited through the plea negotiations. *Id.* at ¶ 7.

{¶ 13} In *State v. Smith*, 2024-Ohio-3012 (8th Dist.), this court recently applied *Rohrbaugh*. Smith challenged the validity of his guilty plea because he “did not personally waive his constitutional right to indictment [on the amended count] in writing or in open court.” *Id.* at ¶ 8. Smith was initially indicted on two counts of rape, both first-degree felonies, and one count of abduction, a third-degree felony. Smith pled guilty to one count of gross sexual imposition in violation of R.C. 2907.05(A)(2), a felony of the third degree, which was not charged in the original indictment. All remaining counts were dismissed.

{¶ 14} This court overruled Smith’s assigned error concluding that

Smith was represented by counsel, and the amendment from a rape charge to a gross-sexual-imposition charge was part of Smith's plea agreement. Smith was not prejudiced by this amendment because he pled guilty to one third-degree felony and the remaining charges against him, which included two first-degree felonies and one third-degree felony, were dismissed.

Id. at ¶ 16. *See also State v. Johnson*, 2016-Ohio-2840, ¶ 21 (8th Dist.) (“[A] knowing and intelligent guilty plea to an amended indictment waives any alleged error within that indictment on appeal.”), citing *State v. Simmons*, 1997 Ohio App. LEXIS 696 (8th Dist. Feb. 27, 1997); *see also State v. Bhambra*, 2017-Ohio-8485, ¶ 6 (8th Dist.).

{¶ 15} Turning to the case at hand, we find that Berkley was represented by counsel, and the amendment was part of Berkley's plea bargain. Although the amended indictment changed the name and identity of the crime charged in Count 1, Berkley was not prejudiced by the amendment because he pled guilty to two third-degree felonies and the remaining six charges against him, including two counts of murder and two counts of involuntary manslaughter, were dismissed. Further, by not objecting to the amended indictment prior to pleading guilty, Berkley invited any error. Just as in *Rohrbaugh*, by negotiating for the amended charges and agreeing to plead guilty to the amended indictment, Berkley cannot now argue the amendment is plain error.

{¶ 16} Accordingly, Berkley's sole assignment of error is overruled.

{¶ 17} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LISA B. FORBES, JUDGE

KATHLEEN ANN KEOUGH, A.J., and
EILEEN A. GALLAGHER, J., CONCUR