

**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. 2011-L-173
	:	
- VS -	:	
	:	
DAWN HOLIN,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 06 CR 000402.

Judgment: Affirmed.

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

Dawn Holin, pro se, PID# 30609-160, FCI Danbury, Route 37, Danbury, CT 06811 (Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Dawn Holin, appeals the Order of the Lake County Court of Common Pleas, striking her Petition to Vacate Judgment of Conviction or Sentence. The issue before this court is whether the failure to serve the opposing party with a copy of a motion, as prescribed by Criminal Rule 49(C), precludes a court from considering the merits of the motion. For the following reasons, we affirm the decision of the court below.

{¶2} On June 16, 2006, Holin was indicted on two counts of Engaging in a Pattern of Corrupt Activity, felonies of the first degree in violation of R.C. 2923.32(A)(1), four counts of Conspiracy to Commit Aggravated Murder, felonies of the first degree in violation of R.C. 2923.01(A)(1), four counts of Conspiracy to Commit Aggravated Arson, felonies of the second degree in violation of R.C. 2923.01(A)(1), and four counts of Conspiracy to Commit Aggravated Arson, felonies of the third degree in violation of R.C. 2923.01(A)(1). The indictments arose out of Holin's involvement in a plot to kill then North Perry Village Mayor Thomas Williams, North Perry Police Chief Denise Mercsak, North Perry Solicitor and Police Prosecutor Joseph M. Gurley, and Painesville Municipal Court Judge Michael A. Cicconetti, using pipe bombs. *See State v. Holin*, 11th Dist. No. 2006-L-170, 2007-Ohio-34, ¶ 2-7.

{¶3} On December 4, 2006, Holin entered a negotiated plea agreement whereby she pled guilty to the four counts of Conspiracy to Commit Aggravated Murder. The trial court entered a Nolle Prosequi on the remaining counts of the indictment. By stipulation pursuant to R.C. 2923.01(F), the parties agreed the Conspiracy convictions would merge and Holin would be sentenced for only one count of Conspiracy to Commit Aggravated Murder.

{¶4} At the change of plea hearing, the trial judge advised Holin of the elements of Conspiracy to Commit Aggravate Murder:

{¶5} Count 3 says that on or between March 1st and April 9th, 2006, as part of a course of criminal conduct in which any one of the elements occurred in Lake County, Ohio, you did with purpose to commit, promote or facilitate the commission of [the] aggravated

murder of Thomas Williams, plan or aid in planning the commission of such offense with Joseph A. Sands. A substantial overt act in furtherance of said conspiracy was done by you or a person with whom you conspired, Joseph Sands, subsequent to your entrance into the conspiracy. A substantial overt act as set forth below was done by you and/or Joseph Sands. Number 1, you and/or Joseph Sands obtained gun powder. Two, you and/or Joseph Sands obtained pipes; [three,] you and/or Joseph Sands obtained end caps. Four, you and/or Joseph Sands obtained wicks; [five,] you and/or Joseph Sands sought assistance from an individual in learning methods to manufacture and/or detonate pipe bombs; and [six,] you and/or Joseph Sands investigated the victim's locations and/or residences and/or schedules. That is called conspiracy to commit aggravated murder. It is a felony of the 1st degree. It's in violation of Revised Code Section 2923.01(A)(1).

{¶6} The prosecutor detailed the evidence demonstrating Holin's involvement in the plot to kill the North Perry officials and her voluntary statements to law enforcement officers admitting her awareness of, and complicity in, the conspiracy to commit the murders. Specifically, the prosecutor stated the evidence would show that Holin solicited, purchased, and paid for the gunpowder for the pipe bombs; that Holin assisted in acquiring the pipe and end caps; that Holin searched for and eventually located the appropriate wicks to make the bombs; and that Holin obtained the

addresses of three of the intended victims. The trial judge then asked Holin whether the State's recitation of the evidence was true. Holin answered affirmatively.

{¶7} Finally, the trial judge asked Holin, "although this may be your attorneys' recommendation for you to plead guilty to these four charges, is this your own decision and voluntary act to do so?" Holin answered affirmatively. The judge also asked Holin, "are you completely satisfied with the representation provided by your attorneys Terry Gilbert and Andrea Whitaker?" Holin answered affirmatively.

{¶8} On December 14, 2006, Holin filed a motion pro se for Withdrawal of Plea. Holin advised the court that she has "dismissed Terry Gilbert as * * * counsel" and sought to withdraw her plea entered on December 4, 2006. Holin alleged she had been "mis-led" and "lied to" about her case and that she and Attorney Gilbert "have had and continue to have major differences and opinions concerning this case."

{¶9} On January 4, 2007, a sentencing hearing was held at which time Holin's motion for Withdrawal of Plea was addressed. Holin explained before the court that a "difference of opinion" existed between her and trial counsel regarding whether she should enter a plea or take the case to trial. Holin wanted to take the case to trial because she was not guilty. Holin stated she entered the plea on December 4, 2006, because she was "pressured" by her attorney to do so.

{¶10} Holin then advised the court that she had dismissed her attorneys. The court construed Holin's advisement as a request to dismiss counsel and thereupon denied the request.

{¶11} The trial court sentenced Holin to a ten-year term of imprisonment for each count, to be served concurrently with each other, and ordered Holin to pay costs.

{¶12} On November 21, 2007, this court affirmed the denial of Holin's motion for Withdrawal of Plea and the sentence imposed by the trial court. *State v. Holin*, 174 Ohio App.3d 1, 2007-Ohio-6255, 880 N.E.2d 515.

{¶13} On November 17, 2011, Holin filed a Petition to Vacate or Set Aside Judgment of Conviction or Sentence.

{¶14} On November 29, 2011, the trial court entered an Order Striking Petition to Vacate Judgment of Conviction or Sentence, pursuant to Criminal Rule 49.

{¶15} On December 20, 2011, Holin filed her Notice of Appeal. On appeal, Holin raises the following assignments of error:

{¶16} "[1.] The appellant was denied her constitutional right to the effective assistance of counsel on appeal, in violation of the Sixth Amendment to the U.S. Constitution."

{¶17} "[2.] The appellant was denied her constitutional right to the effective assistance of counsel during plea negotiations, in violation of the Sixth Amendment to the U.S. Constitution."

{¶18} Holin maintains she received ineffective assistance of counsel in that her attorneys "never advised her of the statutory elements of the crimes with which she was charged (at least not to the degree that she could understand them with any certainty)," and that appellate counsel misled her into believing that counsel would "do what was required in order for the appellate court to reopen her criminal case based on her continuous claim of being innocent of any wrongdoing."

{¶19} The trial court struck Holin's Petition to Vacate based on Criminal Rule 49(C), which provides: "All papers required to be served upon a party shall be filed

simultaneously with or immediately after service. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and the manner of service and shall be signed and filed in the manner provided in Civil Rule 5(D).”

{¶20} Holin’s Petition to Vacate did not contain a certificate of service or proof of service separately filed.

{¶21} Ohio courts have strictly enforced the provisions of Criminal Rule 49(C) and Civil Rule 5(D). “Where there is no proof of service either attached to a filing or separately filed with the trial court, the trial court may not consider the filing.” *PHH Mtge. Corp. v. Albus*, 7th Dist. No. 09 MO 9, 2011-Ohio-3370, ¶ 12 (cases cited); *Pla v. Wivell*, 9th Dist. No. 25814, 2011-Ohio-5637, ¶ 15 (“[b]ecause Mother filed her motion without the necessary certificate of service * * *, the magistrate could not consider her motion”); *State v. Blalock*, 2nd Dist. No. 6701, 1981 Ohio App. LEXIS 13175, *8 (Aug. 4, 1981), (“[s]ince the appellant did not properly serve notice on the state, the matter could not be considered by the court”).

{¶22} Criminal 49(C) and Civil Rule 5(D) have been applied with equal rigor to pro se litigants. *Deutsche Bank Natl. Trust Co. v. Lagowski*, 7th Dist. No. 10 BE 28, 2012-Ohio-1684, ¶ 42 (“Ohio courts have held that where a pro-se defendant files an answer without proof of service, the trial court could not consider the answer”) (cases cited); *State v. Tyndall*, 2nd Dist. No. 2000 CA 120, 2001 Ohio App. LEXIS 5283, *7 (Nov. 30, 2001) (where the appellant “neither served the prosecutor with his motions nor endorsed upon them a proof of service * * *, * * * the trial court should not have considered these *pro se* motions”).

{¶23} Holin's assignments of error are without merit.

{¶24} For the foregoing reasons, the Order of the Lake County Court of Common Pleas, striking Holin's Petition to Vacate, is affirmed. Costs to be taxed against the appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.