

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-39
Plaintiff-Appellee	:	
	:	Trial Court Case No. 02-CR-005
v.	:	
	:	
CARLOS KERBY	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 19th day of February, 2010.

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Attorney for Plaintiff-Appellee

CARLOS KERBY, #449-990, Lebanon Correctional Institution, P.O. Box 56, Lebanon, Ohio 45036
Defendant-Appellant, *pro se*

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FAIN, J.

{¶ 1} Defendant-appellant Carlos Kerby appeals from an order denying his motion to withdraw a guilty plea to charges of Involuntary Manslaughter, in violation of R.C. 2903.04(A), and Aggravated Robbery, in violation of R.C. 2911.01(A)(1). Following the plea, Kerby was convicted and was sentenced to an agreed prison term of ten years on each charge, with the sentences to be served consecutively, for

a total of twenty years in prison.

{¶ 2} Kerby contends that the trial court abused its discretion in determining whether trial counsel was competent, and in determining whether the Crim. R. 11 hearing was full and fair. Kerby further contends that the trial court erred in refusing to allow him to withdraw his plea, because the indictment failed to include a mens rea element – that he knowingly and recklessly possessed or brandished a deadly weapon.

{¶ 3} We conclude the trial court did not err in denying the motion to withdraw Kerby's guilty plea. The basis for Kerby's motion is that he could not have knowingly entered a plea, because trial counsel and the trial court did not understand that the counts in the indictment are missing a mens rea element. However, the predicate offense for the Manslaughter conviction is Aggravated Robbery, in violation of R.C. 2911.01(A)(1), which is a strict-liability offense. The indictment is, therefore, not required to contain further mens rea language. Kerby also failed to furnish the transcript of his Crim. R. 11 hearing, and we are required to presume the regularity of the proceedings. Because Kerby failed to establish manifest injustice, the trial court did not err in denying the motion to set aside the guilty plea. Accordingly, the order of the trial court from which this appeal is taken is Affirmed.

I

{¶ 4} In November 2001, three men attempted to rob a Family Video Store in Springfield, Ohio. The men entered the vestibule of the store and demanded money. When they saw one of the clerks, Chad Kautz, on the telephone, one of the

men fired a shotgun blast through the glass window of the vestibule. Kautz died as a result of the injuries he sustained, and the other clerk was extensively injured. After receiving some anonymous tips and investigating, the police questioned Kerby about one month later, and obtained a confession. The two other men involved in the shooting were Carlos's brother, William Kerby, and Jawhan Massey. See *State v. Kerby*, 162 Ohio App.3d 353, 2005-Ohio-3734, and *State v. Kerby*, Clark App. No. 03-CA-55, 2007-Ohio-187, at ¶ 9-11. William Kerby pled no contest to one count of Aggravated Murder, one count of Aggravated Robbery, one count of Tampering with Evidence, and one count of Felonious Assault, and received a total aggregate sentence of life imprisonment, with parole eligibility after thirty-one (31) years. See *State v. Kerby*, Clark App. No. 2006 CA 73, 2007-Ohio-3810, at ¶¶ 1 and 13 (affirming William Kerby's conviction and sentence).

{¶ 5} Carlos Kerby initially pled no contest to, and was convicted of, Aggravated Murder with a firearm specification, Murder, Aggravated Robbery and Felonious Assault. *Kerby*, 2007-Ohio-187, at ¶ 1, and 16-17. Carlos Kerby was then sentenced to life imprisonment, with parole eligibility after 27 years. *Id.* at ¶ 17. We reversed the conviction and remanded the matter for further proceedings, because we concluded that Kerby's confession was involuntary. *Id.* at ¶ 42-88.

{¶ 6} After the matter was remanded, the State agreed to amend Count Two (the Murder charge) to Involuntary Manslaughter, to dismiss the firearm specifications in Count Two and Count Three (the Aggravated Robbery charge), and to dismiss the remaining counts. The parties also agreed to a ten-year sentence on both counts, and that the sentences would be served consecutively, for a total of

twenty years. Kerby then pled guilty to Involuntary Manslaughter and Aggravated Robbery, and was sentenced to ten years in prison on each charge, with the sentences to be served consecutively. The judgment entry of conviction was filed on June 9, 2008.

{¶ 7} In December 2008, Kerby filed, *pro se*, a “Motion to Withdraw No Contest Plea Because of Manifest Injustice.”¹ The basis for the motion is that the indictment for Aggravated Robbery fails to allege mens rea with respect to possession of a deadly weapon, and is therefore invalid for purposes of establishing an underlying felony for the Involuntary Manslaughter charge. Kerby further alleged that “mens rea” was not mentioned when the trial court accepted his guilty plea.

{¶ 8} The trial court denied Kerby’s motion. The court held that the part of the Aggravated Robbery statute setting forth the deadly weapon element put Kerby on notice of the mens rea required. The court also concluded that Kerby had been afforded a thorough and detailed Crim. R. 11 colloquy. Kerby appeals from the order denying his motion to withdraw his plea.

II

{¶ 9} Kerby’s First Assignment of Error is as follows:

{¶ 10} “THE TRIAL COURT ABUSED ITS DISCRETION IN VIOLATION OF APPELLANT’S RIGHTS TO DUE PROCESS OF LAW UNDER THE OHIO AND U.S. CONSTITUTION IN NOT EXERCISING ITS DISCRETION IN DETERMINING WHETHER COUNSEL WAS COMPETENT; WHETHER THE CRIM. R. 11 HEARING WAS FULL AND FAIR DENYING APPELLANT A FULL AND FAIR

HEARING ON HIS MOTION TO WITHDRAW.”

{¶ 11} Under this assignment of error, Kirby contends that the trial court abused its discretion by failing to comply with requirements for determining whether to allow withdrawal of no-contest or guilty pleas. In this regard, Crim. R. 32.1 provides that:

{¶ 12} “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.”

{¶ 13} The motion to withdraw in the case before us was filed after sentence. Accordingly,

{¶ 14} the standards cited by Kerby from *State v. Peterseim* (1979), 68 Ohio App.2d 211, do not apply. *Peterseim* involves a pre-sentence request for withdrawal, which poses different considerations from post-sentence requests. *Id.* at 212-13.

{¶ 15} Because the case at hand involves a post-sentence attempt to withdraw a guilty plea, Kerby has the burden of establishing manifest injustice. *State v. Smith* (1977), 49 Ohio St.2d 261, paragraph one of the syllabus. “A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court.” *Id.* at paragraph two of the syllabus.

¹The motion is incorrectly styled – Kerby pled guilty.

{¶ 16} Manifest injustice requires a showing of “extraordinary circumstances.” *State v. Kidd*, 168 Ohio App.3d 382, 2006-Ohio-4008, at ¶ 11 (citation omitted). “‘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.’” *State v. Smith*, Trumbull App. No. 2007-T-0076, 2008-Ohio-1501, at ¶ 18 (citation omitted). “A defendant seeking to withdraw a guilty plea following an 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*, Franklin App. No. 04AP-42, 2004-Ohio-6836, at ¶ 5 (citations omitted).

{¶ 17} In the case before us, Kerby failed to attach affidavits to his motion. He has also failed to cite to facts in the record that would justify a finding of extraordinary circumstances. Instead, Kerby simply claims that the indictment fails to contain the necessary mens rea requirement for Aggravated Robbery. Kerby has also failed to provide this court with a transcript of the Crim. R. 11 hearing, where he would have been instructed about his rights before entering a guilty plea. In the absence of a record suggesting the contrary, we presume the regularity of the proceedings in the trial court. *State v. Thornhill* (Oct. 5, 2001), Champaign App. No. 2001 CA 15. See also, e.g., *Jordan*, 2004-Ohio-6836 at ¶ 6, *City of Parma v. Taylor*, Cuyahoga App. No. 87162, 2006-Ohio-3973, at ¶ 5, and *Smith*, 2008-Ohio-1501, at ¶ 20 (noting that an appellate court cannot determine whether manifest injustice occurred at a plea hearing, where the defendant fails to provide a transcript of

hearing).

{¶ 18} Furthermore, Kerby failed to allege in the trial court that he was not advised of his rights. His argument, instead, was that he could not have knowingly entered a plea, because neither counsel nor the trial court “understood” that the counts of the indictment are missing the mens rea element.

{¶ 19} Kerby was originally indicted in Count One for purposely causing the death of another (Chad Kautz) while committing or attempting, or while fleeing immediately after committing, an Aggravated Robbery, in violation of R.C. 2903.01(B). Count Two of the indictment alleges that Kerby caused the death of another while committing or attempting to commit an offense of violence, Aggravated Robbery under R.C. 2911.01(A)(1), in violation of R.C. 2903.02(B). Count Three of the indictment alleges that Kerby, in attempting to commit or in committing a theft offense, or in fleeing afterward, had a deadly weapon under his control and either displayed the weapon, brandished it, or used it, in violation of R.C. 2911.01. The Fourth Count alleges that Kerby knowingly caused physical harm to another (Matthew Brown) by means of a deadly weapon, a firearm, in violation of R.C. 2903.11(A)(2). All four counts contain firearm specifications.

{¶ 20} As part of the plea agreement, Count Two was amended to Involuntary Manslaughter, in violation of R.C. 2903.04(A), Count Three was amended to Aggravated Robbery in violation of R.C. 2911.01, and the remaining counts and firearm specifications were dismissed. In denying Kerby's motion to withdraw his plea, the trial court noted that R.C. 2911.01(A)(1) alerts defendants to the mens rea required for the offense. The State also points out on appeal that R.C.

2911.01(A)(1) is a strict-liability offense, and that the indictment does not need to contain a separate mens rea element.

{¶ 21} R.C. 2911.01 provides that:

{¶ 22} “(A) No person in attempting or committing a theft offense, as defined in R.C. 2913.01 of the Ohio Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following;

{¶ 23} “(1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”

{¶ 24} In *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 (*Colon I*), the Ohio Supreme Court held that an indictment that tracks the statutory language in R.C. 2911.02(A)(2) is defective, because it omits a mens rea element “for the actus reus element stated in subsection (2): ‘Inflict, attempt to inflict, or threaten to inflict physical harm on another.’” *Id.* at ¶ 10. The court also held in *Colon I* that “When an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment.” *Id.* at syllabus.

{¶ 25} Subsequently, the Ohio Supreme Court limited *Colon I* to cases pending at the time it was decided. See *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 (*Colon II*). *Colon I* was decided on April 9, 2008, which is prior to the date of Kerby’s guilty plea on May 30, 2008. Therefore, *Colon I* would potentially apply.

{¶ 26} However, in *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, the

Ohio Supreme Court concluded that R.C. 2911.01(A)(1) imposes strict liability for the element of “brandishing, displaying, using, or indicating possession of a deadly weapon.” *Id.* at ¶ 1. The Ohio Supreme Court distinguished *Colon I*, noting that:

{¶ 27} “Moreover, *Colon I* is not dispositive of the issue here. This case addresses the defendant's use, display, brandishing, or indicating possession of a deadly weapon under R.C. 2911.01(A)(1), unlike *Colon I*, which addressed the element of inflicting or threatening to inflict physical harm under R.C. 2911.02(A)(2). Additionally, as previously noted, the parties in *Colon I* did not contest the issue of whether R.C. 2911.02(A)(2) required a mens rea, and this court's discussion of that issue in *Colon I* consequently was limited.” *Id.* at ¶ 30. The Ohio Supreme Court also stated that:

{¶ 28} “We are persuaded that the General Assembly, by not specifying a mens rea in R.C. 2911.01(A)(1), plainly indicated its purpose to impose strict liability as to the element of displaying, brandishing, indicating possession of, or using a deadly weapon. Cf. R.C. 2901.21(B).” *Id.* at ¶ 32.

{¶ 29} We had reached the same conclusion prior to *Lester*, and had rejected *Colon's* application in cases involving indictment for Aggravated Robbery, under R.C. 2911.01. See, e.g., *State v. Smith*, Montgomery App. Nos. 21463, 22334, 2008-Ohio-6330. We later explained our reasoning, in *State v. Combs*, Montgomery App. No. 22743, 2009-Ohio-4109, stating that:

{¶ 30} “Finally, the third assignment of error alleges that the indictment was defective because it failed to specify the requisite degree of mental culpability for the crime of aggravated robbery. *Combs* cites *State v. Colon*, 118 Ohio St.3d 26, 885

N.E.2d 917, 2008-Ohio-1624, for the proposition that an indictment that fails to charge a culpability state is defective. *Colon* held that robbery under R.C. 2911.02(A)(2), a theft offense in which a person ‘[i]nfllict[s], attempt[s] to inflict, or threaten[s] to inflict physical harm on another ,’ is not a strict liability offense. Thus, an indictment charging this offense must specify the appropriate culpability state.

{¶ 31} “*Colon*, however, does not apply here. Combs was charged with aggravated robbery under R.C. 2911.01(A)(1), which while also a theft offense is one where an offender ‘[has] a deadly weapon on or about the offender's person or under the offender's control and either display[s] the weapon, brandish[es] it, indicate[s] that the offender possesses it, or use[s] it.’ Our district, and others, have held that this offense is one that imposes strict liability. *State v. Smith*, Montgomery App. Nos. 21463, 22334, 2008- Ohio-6330, at ¶ 73 (citing other appellate court decisions holding the same). Because strict liability offenses have no requisite degree of culpability, Combs's indictment was not defective.” *Combs*, 2009-Ohio-4109, at ¶ 14-15.

{¶ 32} Pursuant to our own decisions and the Ohio Supreme Court’s decision in *Lester*, *Colon I* does not apply to the case before us, and the indictment is not defective. The trial court, therefore, did not abuse its discretion in denying Kerby’s motion to withdraw his guilty plea.

{¶ 33} We have also held that a plea of guilty to “aggravated robbery charges waives any defect in the indictment occasioned by the failure to allege any culpable mental state.” *State v. Smith*, Clark App. No. 08CA0060, 2009-Ohio-5048, at ¶ 25. Other courts have reached the same conclusion. See, e.g., *State v. Gaston*,

Cuyahoga App. No. 92242, 2009-Ohio-3080. This is based on the theory that a guilty plea waives defects in the indictment, because “ [b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime.’ ” Id. at ¶ 6 (citation omitted).

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{¶ 34} Kerby’s First Assignment of Error is overruled.

II

{¶ 35} Kerby’s Second Assignment of Error is as follows:

{¶ 36} “THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT VACATING THE NO CONTEST PLEA WHERE MANIFEST INJUSTICE OCCURRED IN THE STATUTE AND INDICTMENT FAILED TO CHARGE AN OFFENSE DEPRIVING THE TRIAL COURT OF SUBJECT MATTER JURISDICTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE OHIO AND UNITED STATES CONSTITUTION.”

{¶ 37} Under this assignment of error, Kerby focuses again on the indictment’s failure to include a mens rea element of knowingly and recklessly possessing, brandishing, possessing, or using a deadly weapon. For the reasons previously stated, this assignment of error is without merit and is overruled.

²*State v. Smith*, Clark App. No. 08CA0060, 2009-Ohio-5048, was decided shortly after the Ohio Supreme Court decision in *Lester*, and we did not address *Lester* in that opinion. In *Smith*, we held that an aggravated robbery indictment was defective because it failed to specify a culpable mental state. We concluded, however, that the defect had been waived, due to the defendant’s guilty plea. After *Lester*, our statement about the defect in the aggravated robbery indictment is no longer correct.

III

{¶ 38} All of Kerby's assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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