[Cite as *State v. North*, 2015-Ohio-720.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-14-18**

v.

GABRIEL J. NORTH, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Logan County Common Pleas Court
Trial Court No. CR 11 12 0260

Judgment Affirmed

Date of Decision: March 2, 2015

APPEARANCES:

Stephanie N. Lape **for Appellant**

Sarah J. Warren **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Gabriel J. North ("North"), brings this appeal from the judgment of the Common Pleas Court of Logan County, Ohio, denying his motion to withdraw a plea of guilty and sentencing him to six years in prison for one count of rape in violation of R.C. 2907.02(A)(2) and two counts of illegal use of a minor in nudity oriented material in violation of R.C. 2907.323(A)(3). North alleges that the trial court erred in denying his motion to withdraw and demands reversal of the trial court's judgment. For the reasons that follow, we affirm the trial court's judgment.

Factual and Procedural Background

{¶2} The facts of this case were set forth at the plea hearing as follows.

> On November 11, 2011, Alaina Kelly telephoned the Logan County Sheriff's Office to report that she believed her friend's 11-year-old daughter had been sexually assaulted by her father, the defendant. She advised that the abuse took place at the defendant's home in Logan County and occurred approximately one year ago.
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> The minor child, J-S, had initially told her Aunt Monica, her mother's sister. Monica told the child's mother, who told her own cousin Amanda, who then called Alaina. Alaina further stated that the child's mother believed her to be acting out; however when Alaina spoke with J-S, the child flooded her with information that caused her to believe that accusation.
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> J-S was subsequently interviewed by Shelby County Children's Services, at which time she disclosed being sexually abused by her father from ages five to seven years old. She had very little contact with him prior to age five and therefore knows this is when the abuse occurred. She was going to her father's every other weekend, and did that until age seven when she stopped going.

> She reported the abuse would occur every time. She described [the details of the sexual abuse]. She stated that he made her watch Internet pornography which depicted adults sexually abusing children. While watching the pornography, J-S would be naked and have to sit on her father's [naked lap].
>
> She tried to tell her father that she did not like the abuse, but he told her it was okay that he touched her. J-S stated that the reason she did not tell sooner was because she was scared, and her dad told her if she told she would not be allowed to see her mom anymore. The pornography that J-S was made to watch with the defendant was on his computer. J-S described the computer as an old style computer, not a laptop.
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> On * * * December 13, 2011, a search warrant was executed at the mobile home of the defendant. The defendant's computer was seized and has been examined by BCI&I. The report prepared by BCI&I listed in its findings that there are more than 70 pictures of child pornography.

(Tr. of Plea Proceeding at 13-15, May 21, 2014.)

{¶3} North was indicted on July 9, 2013, on three counts of rape, felonies of the first degree; three counts of gross sexual imposition, felonies of the third degree; seventeen counts of illegal use of a minor in nudity oriented material, felonies of the fifth degree; and twenty-five counts of pandering sexually oriented material, felonies of the fourth degree.[1] (R. at 12, 26.) Two attorneys were appointed to represent North in the trial court, attorney Steven Fansler and attorney Mark Triplett. (R. at 19, 23.) North initially entered a plea of not guilty. (R. at 22, 28.) After extensive discovery, multiple pleadings, and several changes

[1] The indictment was amended on August 14, 2013 by correcting punishment sections for the rape counts.

of trial date, the case was eventually scheduled for a trial on May 29, 2014. (R. at 65.)

{¶4} On May 21, 2014, the date scheduled for a final pretrial, North indicated his desire to enter a plea of guilty. (R. at 94; Tr. of Plea Proceeding.) Pursuant to the plea agreement, North would plead guilty to one count of rape, as amended to delete the age factor from the charge and result in a diminished maximum sentence, and two counts of illegal use of a minor in nudity oriented material. (Tr. of Plea Proceeding at 3.) The remaining charges were to be dismissed. (*Id.* at 3-4.) The parties also agreed to a joint recommendation of a six-year sentence on the rape count and twelve-month sentences on each of the counts of illegal use of a minor in nudity oriented material, all to be served concurrently to one another. (*Id.* at 4.)

{¶5} Before accepting the plea, the trial court conducted a plea hearing, during which it confirmed that North was entering the plea voluntarily and that he understood the nature of the charges and the rights that he was giving up. (*Id.* at 8-12.) The trial court then asked whether North had any questions about the statement of the evidence read by the State, as it is quoted in this opinion above. (*Id.* at 15.) Upon North's negative answer, the trial court instructed him that by pleading guilty he was admitting the truth of that factual statement. (*Id.*) North then tendered his plea of guilty to each of the three charges, which the trial court accepted, finding that North entered the pleas knowingly, voluntarily, and

intelligently. (*Id.* at 16.) The trial court then dismissed the remaining charges, ordered a presentence investigation report, and continued the case for sentencing on June 23, 2014. (*Id.* at 17.)

{¶6} On June 16, 2014, new counsel, Adam Bleile, entered appearance on behalf of North, and filed a motion to withdraw his guilty plea. (R. at 96, 97.) As the basis for the motion, North alleged that his request was "based on a claim of actual innocence." (R. at 97 at 2.) The motion further stated:

> Defendant, Gabriel North, entered a plea because he believed he had no other legal options available to him. This belief of Mr. North is incorrect as there are legal options open to him. Mr. North continues to claim actual innocence. Mr. North sought private counsel to continue to fight this case and prove his innocence at trial. There is evidence which tends to prove Mr. North would be found not guilty.

(*Id.*) The trial court assigned the matter for an evidentiary hearing, which took place on July 3, 2014.

{¶7} At the hearing on the motion to withdraw, the trial court took judicial notice of attorney Fansler and Triplett's standing in the community and their lengthy and varied experience with the most serious cases before the court. (Tr. of Hr'g at 5-7, July 3, 2014.) In response, the new defense counsel agreed that he could not criticize prior counsel for the work they did on North's case, adding that he thought highly of them. (*Id.*) North did not testify at the evidentiary hearing, but he presented the following arguments through his counsel in support of the plea withdrawal.

{¶8} It was North's position that the request to withdraw his guilty plea was based on a claim of "actual innocence and not just a change of heart." (*Id.* at 8.) Attempting to support this position, North argued that the State's evidence showed that the computer allegedly containing improper material was actually broken; therefore, there was no evidence that he had "any knowledge of its material whatsoever." (*Id.* at 13.) Similarly, North argued that the State had no evidence to prove that a flash drive recovered from his residence "was ever accessed"; as such, no evidence showed that North ever viewed the images it contained. (*Id.*)

{¶9} As it related to the rape charge, North asserted that his daughter had an "absolute" motive to lie. (*Id.*) North alleged that "[a]t the time this allegation was made, there was motive and threats by the child about how she was going to get back at father because supposedly dad did not financially support her the way her and her mother thought should happen." (*Id.* at 13-14.) North argued that the specific computer described by J.S. showed "zero instances of child pornography"; therefore "[i]t could not have occurred the way she said it did." (*Id.* at 14.) North further argued that J.S.'s allegations as to the location in his home where the abuse occurred made no sense due to unavailability of Wi-Fi connection in North's residence in 2005, when the alleged abuse occurred. (*Id.* at 14-15.)

{¶10} Of note, North offered no testimony or evidence at the evidentiary hearing, other than the plea hearing transcript and a copy of the plea agreement. (*Id.*, Ex. I and II.) He did not provide any specifics to support the allegations that

J.S. lied, threatened him, or made inconsistent statements. No specific references to the State's evidence were made either, as to support the allegations that the computer was broken or the flash drive was never accessed. North's counsel admitted that he had the images that had been recovered by the police in their investigation. (*Id.* at 16.)

{¶11} We should note that during the evidentiary hearing, North attempted to challenge the proceedings of the grand jury with respect to the child pornography charges. (*Id.* at 8-9.) He also alleged that the statute charging these offenses was unconstitutional. (*Id.* at 9-12.) He apparently abandoned these arguments and they are not raised on appeal.

{¶12} The State did not present any evidence at the hearing. The State argued that while the issues raised by North were questions of credibility, they did not support a claim of actual innocence. (*Id.* at 17.) The State cited specific pages of the plea hearing transcript, where North stated that he was satisfied with his attorneys and where he was admitting factual allegations of all three counts of the guilty plea. (*Id.* at 17-18.) The State commented that the plea agreement was very favorable to North, exchanging a possible sentence of life in prison to the joint recommendation of six years in prison. (*Id.* at 20.) Concluding, the State pointed out that there was nothing before the court to suggest that North had not understood or fully comprehended the allegations or the consequences of entering his guilty plea. (*Id.*)

{¶13} The trial court denied the motion, finding that although the State "did not claim any great prejudice regarding the withdrawal" and "[t]here was no question as to the reasonableness of the time of the motion," "[t]he defense did not present anything that would present a complete defense." (R. at 108, J. Entry at 4-5, July 8, 2014.) The trial court further noted that North received very good representation by counsel at the plea stage of the proceedings, "[t]he defense had no criticism of the plea procedure," and North "understood the nature of the charges and potential sentences" when he was entering the plea. (*Id.*)

{¶14} On July 14, 2014, the trial court held a sentencing hearing and ordered that North serve a total term of six years in prison. (R. at 112.) North now appeals raising the following assignment of error.

> **The trial court abused its discretion when it denied appellant his pre-sentence motion to withdraw his guilty plea based on actual innocence.**

Analysis

{¶15} North alleges that he should have been allowed to withdraw his guilty plea and that the trial court erred in finding otherwise because a motion to withdraw guilty plea made before sentencing should be freely granted. *See State v. Xie*, 62 Ohio St.3d 521, 526, 584 N.E.2d 715 (1992). The Ohio Supreme Court held, however, that under Crim.R. 32.1 "[a] defendant does not have an absolute right to withdraw a guilty plea prior to sentencing." *Id.*, at paragraph one of the syllabus. Instead, it is within the sound discretion of the trial court to determine,

upon a hearing, "whether there is a reasonable and legitimate basis" for the pre-sentencing withdrawal of the plea. *Id.*, at paragraphs one and two of the syllabus. Accordingly, our review of the trial court's judgment in this case is under an abuse of discretion standard. *State v. Francis*, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, ¶ 32; *State v. Maney*, 2013-Ohio-2261, 993 N.E.2d 422, ¶ 17 (3d Dist.).

{¶16} Because "[a]n abuse of discretion is more than an error in judgment," we will not substitute our judgment for that of the trial court, and will only reverse the trial court's decision if it was "unreasonable, arbitrary, or unconscionable." *Maney* at ¶ 17, citing *State v. Adams*, 62 Ohio St.2d 151, 157–158, 404 N.E.2d 144 (1980); *State v. Liles*, 3d Dist. Allen No. 1-10-28, 2010-Ohio-5799, ¶ 17, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Under this standard, the appellate courts in Ohio look at the following, nonexclusive, list of factors in their review of the trial court's decision on a motion to withdraw a plea:

> (1) whether the withdrawal will prejudice the prosecution; (2) the representation afforded to the defendant by counsel; (3) the extent of the hearing held pursuant to Crim.R. 11; (4) the extent of the hearing on the motion to withdraw the plea; (5) whether the trial court gave full and fair consideration of the motion; (6) whether the timing of the motion was reasonable; (7) the stated reasons for the motion; (8) whether the defendant understood the nature of the charges and potential sentences; and (9) whether the accused was perhaps not guilty or had a complete defense to the charges.

Maney at ¶ 18, citing *State v. Griffin,* 141 Ohio App.3d 551, 554, 752 N.E.2d 310 (7th Dist.2001), and *State v. Fish,* 104 Ohio App.3d 236, 240, 661 N.E.2d 788 (1st Dist.1995); *Liles* at ¶ 16. None of the factors is determinative on its own and there may be numerous additional aspects "weighed" in each case. *Griffin* at 554; *accord Fish* at 240.

{¶17} Out of the factors enumerated above, the only ones at issue in this appeal concern the stated reasons for the motion (factor 7), and the claim of innocence or a complete defense to the charges (factor 9). North concedes that he was "afforded competent, even excellent counsel" (factor 2) that he "received a proper Rule 11 hearing" (factor 3), and that he received "a full and fair hearing on his motion to withdraw plea" (factor 4). (Reply Br. at 2.) He does not allege that the trial court failed to fully and fairly consider his motion (factor 5); and our review of the hearing transcript and the trial court's decision does not reveal any insufficiencies in this respect. Importantly, North does not claim that he did not understand the nature of the charges or the potential sentences when he entered the plea (factor 8). Similarly, the State does not allege any prejudice (factor 1), and does not dispute the trial court's finding that the timing of the motion was reasonable (factor 6). Accordingly, in this opinion we focus on reviewing the trial court's reasoning as it relates to North's claim of "actual innocence" (factor 9), which was his stated reason for the motion to withdraw (factor 7). (R. at 97, Mot. Withdraw Guilty Plea at 2.)

{¶18} While North labeled his reason for withdrawal as a claim of "actual innocence," his "proof" of that innocence consisted of a challenge to the grand jury proceedings (Tr. of Hr'g at 8, July 3, 2014), a challenge to the statute under which he was charged with the use of a minor in nudity oriented material (*id.* at 9, 12), challenges to the State's evidence (*id.* at 13), and challenges to his daughter's credibility (*id.* at 13-15). Importantly, at no point was there a claim that North did not commit the acts to which he pled guilty. Accordingly, while North argued that his request to withdraw is based on a claim of actual innocence, no such claim was expressly made at the evidentiary hearing.

{¶19} In his brief, North cites a case from the Seventh District Court of Appeals where a defendant wrote a letter to the court approximately a week after entering his plea of guilty to a charge of murder, claiming that "his mother encouraged him to plead guilty and that he was not the offender in this crime." *State v. Cuthbertson*, 139 Ohio App.3d 895, 897, 2000-Ohio-2638, 746 N.E.2d 197 (7th Dist.). At the plea withdrawal hearing, the defendant testified that he was innocent, that he "never wanted to take a plea bargain," and that, due to the pressures from his mother and discussions with his attorney, he felt like it was "the only thing for [him] to do." *Id.* at 897-898. The trial court denied the motion, finding that the defendant failed to articulate "any reason for his motion other than a change of mind." *Id.* at 899. The Court of Appeals reversed, holding that "appellant articulated more than a mere change of mind." *Id.* In particular,

Cuthbertson "stated specific reasons for his desire to withdraw his plea" in a letter to the court received by the court approximately one week after the plea hearing and then repeated those reasons at the evidentiary hearing. *Id.* The court noted that Cuthbertson "set forth the possibility of a defense to the charge by maintaining his claims that he was not the perpetrator of the murder yet implying that he was present." *Id.*

{¶20} We have previously declined to follow *Cuthbertson* in a case where there was no claim of being pressured into signing the plea agreement and where there were several instances of potential prejudice to the state. *State v. Ford*, 3d Dist. Union No. 14-11-13, 2012-Ohio-1280, ¶ 56-57. In another case, we distinguished *Cuthbertson* because the defendant made "no claim that he was not actually guilty of the charges." *State v. Prince*, 3d Dist. Auglaize No. 2-12-07, 2012-Ohio-4111, ¶ 26. In the current case, unlike in *Cuthbertson*, North did not testify that he was innocent, or that he was pressured into entering the plea, so as to possibly undermine the voluntary nature of the plea. Therefore, we refuse to reverse the trial court's decision in reliance on *Cuthbertson*.

{¶21} North cites another case from the Seventh District Court of Appeals, *State v. Griffin*, 141 Ohio App.3d 551, 2001-Ohio-3203, 752 N.E.2d 310 (7th Dist.). There, the defendant, Griffin, indicated his desire to withdraw his guilty plea two weeks after entering it. *Id.* at 553. Griffin wrote a letter to the court asking for new counsel, stating that he was not guilty, that his attorney pressured

him to taking the plea, and that his attorney lied to him about talking to an eyewitness to his crime. *Id.* After his new counsel filed a formal motion to withdraw, the claims were repeated at "the plea-withdrawal hearing," and were supported by additional details. *Id.* Those claims arguably "bolster[ed] the self-defense contentions that he had been making since his initial statement to police." *Id.* at 553, 555. The *Griffin* court referred to *Cuthbertson*, listing the factors that it considered of importance in allowing the withdrawal of the motion in that case: lack of prejudice to the state, stated innocence, allegations of being pressured into taking the plea, timeliness of the motion, "specific reasons for plea withdrawal," and the fact that "the defendant repeated the reasons at the withdrawal hearing." *Id.* at 554, citing *Cuthbertson*, supra. The court of appeals then reviewed Griffin's original plea hearing and determined that it showed Griffin's "uncertainty as to the terms of the plea and the benefit to him." *Id.* at 556. Balancing the factors for the plea withdrawal, the court of appeals held that "professed innocence; confusion; timeliness; and a judicial standard of free and liberal granting of such a motion," weighed in favor of the motion, while the only factor against it was "the restoration of the state of Ohio to the position it had prior to the plea bargain." *Id.* Therefore, the Seventh District Court of Appeals reversed the trial court's denial of the motion to withdraw. *Id.* In the record before us, unlike in *Griffin*, there are no allegations of confusion, untruthful statements by the attorney, being pressured

by the attorneys into taking the plea, or statements in support of North's defense that have been made since the beginning of the action.

{¶22} Finally, North cites a case where the Sixth District Court of Appeals reversed the trial court's denial of the motion to withdraw because the defendant had "identified evidence which, if believed, would enable him to obtain an acquittal." *State v. Kutnyak*, 6th Dist. Wood No. WD-11-038, 2012-Ohio-3410, ¶ 13. There, the defendant asserted that he had discovered new evidence to support his defense of consent to the charge of gross sexual imposition. *Id.* at ¶ 11. Kutnyak identified several witnesses "who would testify as to the victim's prior conduct and events prior to the date of this offense which could impeach the victim's testimony and establish appellant did not commit a crime." *Id.* The court emphasized that Kutnyak had set forth "the specific facts about which each of these witnesses would be able to testify." *Id.* Because of this support for his claim of innocence, the court of appeals found that "his motivation for withdrawing his plea was not based on a mere change of heart." *Id.*

{¶23} Contrary to Kutnyak, North has not identified *any* witnesses who would testify in his defense to establish that his daughter had lied about the sexual abuse. Furthermore, unlike the specific claims raised in *Kutnyak*, North's allegations of inconsistencies in the State's evidence were very general, and they were not supported by any exhibits at the evidentiary hearing. Nor were any

specific exhibits or parts of the record identified in support of his contentions. An example of North's *general* arguments made at the evidentiary hearing follows.

> When you're talking factually speaking, what I found out was that they're making an allegation that he had this thing, and you also have to know of its content. You have to know what you have pictures of. If you have a flash drive, you have to know what's on that thing. Well, come to find out after reviewing the BCI report, the computer that they allege contained improper material was actually broken. So there's nothing on there that supports that he had any knowledge of its material whatsoever.
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> So they have a disk—I'm sorry. A flash drive. Two different things. A flash drive and they have a computer. The computer is broken. The flash drive, they have nothing that it was ever accessed. The combination of the two creates an absolute not guilty.

(Tr. of Hr'g at 12-13, July 3, 2014.) The BCI report to which North referred in the above argument was not produced at the evidentiary hearing.

{¶24} North asserts that under *Kutnyak*, it is "unnecessary to present sworn testimony or affidavits to support the claim of innocence." (App't Br. at 4; Reply Br. at 2.) He misrepresents *Kutnyak*'s holding. The Sixth District Court of Appeals recognized the need to support a defendant's claims of innocence with an offer of evidence to support the claim. *Kutnyak* at ¶ 14, citing *State v. Richey*, 6th Dist. Sandusky No. S-09-028, 2011-Ohio-280, ¶ 63 (upholding trial court's denial of a motion to withdraw his plea where "appellant did not provide the trial court with any evidence to support his claims of innocence or establish a meritorious defense"), and *State v. Scott*, 6th Dist. Sandusky No. S-05-035, 2006-Ohio-3875, ¶ 13 ("a defendant's claims of innocence are not sufficient, absent any offer of

evidence to support this claim, to warrant withdrawal of a plea knowingly entered"). It held, however, that in that particular case, the affidavits or sworn testimony were not necessary because "appellant has specifically identified potential witnesses and their generalized testimony to support his claim of innocence," and it was "unlikely that appellant would misrepresent any of these witnesses or their potential testimony in order to withdraw his plea because the prosecution can try him on charges of rape if his plea is withdrawn." *Id.* Because North has not specifically identified any potential witnesses, this part of *Kutnyak*'s reasoning is inapplicable.

{¶25} Finally, unlike in *Kutnyak*, North made no claims of newly discovered evidence. There are no allegations that the BCI report or any statements made by the witnesses in this case were not available to North before he entered his guilty plea. On the contrary, the record indicates that a copy of the BCI report and a list of witnesses were provided to North on August 9, 2013. (R. at 24.) We cannot now accept North's unsupported suggestions that exculpatory evidence was available, but ignored, by the competent trial counsel.

{¶26} The trial court found that North "did not present anything that would present a complete defense." (R. at 108, J. Entry at 5.) We agree. We have repeatedly held that a mere claim of innocence, without any offer of evidence to support it, is not sufficient to warrant withdrawal of a plea knowingly entered. *State v. Hill*, 3d Dist. Henry No. 7–12–11, 2013-Ohio-3873, ¶ 16, citing *Scott*, 6th

Dist. Sandusky No. S–05–035, 2006-Ohio-3875, at ¶ 13, *State v. Powers,* 4th Dist. Pickaway No. 03CA21, 2004-Ohio-2720, ¶ 18, and *State v. Striblin,* 5th Dist. Muskingham No. CT2009-0036, 2010-Ohio-1915, ¶ 18 (stating that "the trial judge must determine whether the claim of innocence is anything more than the defendant's change of heart about the plea agreement"); *State v. Streeter,* 3d Dist. Allen No. 1-08-52, 2009-Ohio-189, ¶ 17; *State v. Vogelsong*, 3d Dist. Hancock No. 5-06-60, 2007-Ohio-4935, ¶ 18. "All defendants who request a withdrawal of their plea base their request upon some claim of innocence." *Powers* at ¶ 18, citing *State v. McGowan,* 8th Dist. Cuyahoga No. 68971, 1996 WL 563618, *5 (Oct. 3, 1996).

{¶27} Our review of the record indicates that North did not present any reasonable and legitimate basis for his motion to withdraw guilty plea and that his claims of innocence were unsubstantiated. Therefore, analyzing the nine factors outlined above, we cannot find that the trial court abused its discretion in denying North's motion to withdraw guilty plea. The only factors that weighed in favor of granting North's request were (1) lack of prejudice to the prosecution and (6) reasonable timing of the motion. Many courts have recognized that "[l]ack of prejudice to the state as a result of plea withdrawal is an important factor." *Griffin*, 141 Ohio App.3d at 554-55, 2001-Ohio-3203, 752 N.E.2d 310 (7th Dist.); *accord State v. Littlefield,* 4th Dist. Ross No. 03CA2747, 2004-Ohio-5996, ¶ 12; *Fish,* 104 Ohio App.3d at 239-240, 661 N.E.2d 788 (1st Dist.1995). Nevertheless,

"[n]one of the factors is determinative on its own." *State v. Rickman*, 3d Dist. Seneca No. 13-13-15, 2014-Ohio-260, ¶ 13. "Where, as here, the trial court finds that the defendant was aware of a possible defense at the time he entered his guilty plea, it is not an abuse of discretion for the trial court to find that a reasonable and legitimate basis did not exist on which to grant a motion to withdraw the plea even though the state would not be prejudiced if the motion were granted." *Littlefield* at ¶ 12.

{¶28} Concluding, the analysis of the nine factors does not show that North had a reasonable and legitimate basis for the plea withdrawal or that the trial court abused its discretion in overruling his motion to withdraw his guilty plea. Accordingly, the assignment of error is overruled.

Conclusion

{¶29} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Logan County, Ohio is therefore affirmed.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.

/jlr