[Cite as *State v. Gibbs*, 2010-Ohio-2246.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	Case No. 10CA3137
	:	10CA3138
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
LANCE L. GIBBS,	:	
	:	**Released 5/19/10**
Defendant-Appellant.	:	

APPEARANCES:

Pamela C. Childers, Chillicothe, Ohio, for appellant.

Michael M. Ater, ROSS COUNTY PROSECUTOR, and Jeffrey C. Marks, ROSS COUNTY ASSISTANT PROSECUTOR, Chillicothe, Ohio, for appellee.

Harsha, J.

{¶1} In this consolidated appeal, Lance L. Gibbs challenges his convictions on three charges stemming from an incident in which Gibbs and his dog allegedly attacked Amanda Parks. In the first case, the court found him guilty of two counts of felonious assault after Gibbs entered a no contest plea. In a related case, Gibbs entered a no contest plea to one count of failure to restrain or confine a vicious dog, and the court found him guilty of that offense.

{¶2} Gibbs contends that the trial court abused its discretion by denying his pre-sentence motion to withdraw his no contest pleas. However the record shows that: 1.) Gibbs received a full Crim.R. 11 hearing before entering his pleas; 2.) he understood the nature of the charges and possible penalties; 3.) the trial court held a full hearing on the withdrawal motion; 4.) the court gave full and fair consideration to the motion; and

5.) Gibbs was represented by highly competent counsel at the change of plea hearing. Although Gibbs claims that he is innocent of or had a defense to the various charges, the only evidence supporting these claims is his own self-serving, sometimes contradictory testimony about events that occurred when Gibbs was intoxicated. Moreover, Gibbs acknowledged that the account of events he gave at the hearing on the withdrawal motion remained essentially unchanged from the story he gave police when he was arrested, i.e. he obtained no new evidence supporting his position after entering the pleas. Thus, the trial court's decision to deny the withdrawal motion was not unreasonable, unconscionable, or arbitrary.

{¶3} Gibbs also argues that the trial court erred by finding him guilty after he pleaded no contest to failure to restrain or confine a vicious dog because the indictment omitted an essential element of the offense. We agree. To indict Gibbs for a violation of R.C. 955.22(D)(2), one of the essential facts that had to be found by the grand jury was that the dog was off Gibbs' premises when he failed to properly restrain it. But the indictment contains no reference to the location of the dog at the time of the attack. Thus, the trial court convicted Gibbs on an indictment essentially different from that found by the grand jury. Moreover, because a no contest plea is only an admission that the facts alleged in the indictment are true, and because the facts in the indictment do not allege an essential element of the offense, Gibbs admitted nothing upon which the court could base a conviction. Accordingly, we reverse Gibbs' conviction for failure to restrain or confine a vicious dog.

I. Facts

{¶4} In November 2008, the Ross County Grand Jury indicted Gibbs in case

number 08CR521on two counts of felonious assault, in violation of R.C. 2903.11. In January 2009, the Grand Jury indicted Gibbs in case number 09CR07 for one count of failure to confine or restrain a vicious dog, in violation of R.C. 955.22. The charges stemmed from an incident in which Gibbs and his dog purportedly attacked Amanda Parks. The trial court consolidated the actions on the State's motion.

{¶5} In February 2009, Gibbs signed "Plea of No Contest" forms stating that he wished to withdraw his not guilty pleas and enter a no contest plea to all of the charges. At a change of plea hearing the same day, Gibbs pleaded no contest to all three counts, and the trial court found Gibbs guilty of the charges. Prior to the sentencing hearing, Gibbs informed the court that he wanted to withdraw his no contest pleas. Trial counsel then filed a written motion to withdraw the pleas, arguing that Gibbs "believe[d] that a defense to the charge[s] may be presented." The court denied the motion after a hearing. Subsequently, the court sentenced Gibbs and he filed an appeal. We dismissed his first appeal for lack of a final, appealable order because the court's sentencing entries did not contain the plea, the jury verdict, or the finding of the court upon which the convictions were based. *State v. Gibbs*, Ross App. Nos. 09CA3110 & 09CA3111, 2009-Ohio-6489. Subsequently, the court issued "nunc pro tunc" entries to correct the error.[1] This appeal followed.

II. Assignments of Error

{¶6} Gibbs assigns the following errors for our review:

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING

[1] Neither party raises the issue, but the court's "nunc pro tunc" entries erroneously state that Gibbs pleaded guilty to all three charges. However, it is clear from the record and the briefs that Gibbs pleaded no contest to the charges, and the court found him guilty. Confusion may have arisen because following the change of plea hearing, Gibbs referred to his no contest pleas as "guilty" pleas in his withdrawal motion and at the hearing on that motion.

APPELLANT'S MOTION TO WITHDRAW HIS NO CONTEST PLEA.

THE TRIAL COURT COMMITTED PLAIN ERROR BY FINDING APPELLANT GUILTY OF A VIOLATION OF R.C. 955.22, CONFINEMENT OR RESTRAINT OF A VICIOUS DOG, WHEN THE INDICTMENT OMITTED AN ESSENTIAL ELEMENT OF THE OFFENSE.

III. Crim.R. 32.1

{¶7} In his first assignment of error, Gibbs contends that the trial court abused its discretion in denying his pre-sentence motion to withdraw his no contest plea. Crim.R. 32.1 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."

{¶8} Generally, a pre-sentence motion to withdraw a plea should be freely and liberally granted. See *State v. Xie* (1992), 62 Ohio St.3d 521, 526, 584 N.E.2d 715. However, a defendant does not have an absolute right to withdraw a guilty or no contest plea prior to sentencing. *Xie* at paragraph one of the syllabus; *State v. Spivey*, 81 Ohio St.3d 405, 415, 1998-Ohio-437, 692 N.E.2d 151. Thus, the decision to grant or deny a presentence motion to withdraw a plea is committed to the sound discretion of the trial court, and we will not reverse the court's decision absent an abuse of that discretion. *Xie* at paragraph two of the syllabus; *Spivey* at 415. The term "abuse of discretion" implies that the court's attitude is unreasonable, unconscionable, or arbitrary. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. "When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181.

{¶9} In determining whether a trial court abused its discretion in denying a pre-sentence motion to withdraw a plea, we consider the following factors: "(1) whether the accused was represented by highly competent counsel, (2) whether the accused was given a full Crim.R. 11 hearing before entering the plea, (3) whether a full hearing was held on the withdrawal motion, and (4) whether the trial court gave full and fair consideration to the motion." *State v. Campbell*, Athens App. No. 08CA31, 2009-Ohio-4992, at ¶7, quoting *State v. McNeil* (2001), 146 Ohio App.3d 173, 176, 765 N.E.2d 884. Although *Campbell* addressed a pre-sentence motion to withdraw a guilty plea, we find these considerations also apply to a pre-sentence motion to withdraw a no contest plea. Other considerations include: "(1) whether the motion was made within a reasonable time; (2) whether the motion set out specific reasons for the withdrawal; (3) whether the accused understood the nature of the charges and the possible penalties; and (4) whether the accused was perhaps not guilty or had a complete defense to the charges." Id., quoting *McNeil* at 176. A change of heart or mistaken belief about the plea is not a reasonable basis requiring a trial court to permit the defendant to withdraw the plea. Id., citing *State v. Lambros* (1988), 44 Ohio App.3d 102, 103, 541 N.E.2d 632.

{¶10} Although the trial court found that Gibbs made his motion to withdraw within a reasonable time, the court denied it. Gibbs admits that the trial court gave him "a full Crim.R. 11 hearing" when he entered the no contest pleas, and the record supports this conclusion. Nonetheless, Gibbs contends that he did not understand the nature of the charges against him or the possible penalties as evidenced by "kites," i.e. prisoner request forms, he sent to the trial court. However, these kites only vaguely claim that Gibbs did not understand the terms of his pleas. Moreover, in signing the

"Plea of No Contest" forms, Gibbs specifically acknowledged that he understood the nature of the charges against him and maximum penalties. In addition, at the change of plea hearing the trial court explained the charges and possible penalties to Gibbs, and Gibbs told the court he understood this information. Gibbs never expressed any confusion at this hearing. And at the hearing on the withdrawal motion, which according to the trial court lasted 45-50 minutes, Gibbs never complained that he did not understand the charges or possible penalties. Thus the record does not support a finding that Gibbs did not understand the nature of the charges or possible penalties.

{¶11} Gibbs also admits that the trial court conducted a "full hearing" on his withdrawal motion, but he contends that the court did not give full and fair consideration to the motion. He claims that the kites he sent the court demonstrated his dissatisfaction with counsel and that he did not understand the consequences of his pleas or the right to a fair trial. Gibbs contends that the court should have asked him about these claims during the hearing. But the kites only generally claim that Gibbs' attorney did not explain his "options and rights to a fair trial." Moreover, Gibbs had ample opportunity during the 45-50 minute hearing on his withdrawal motion to elaborate on these concerns but failed to do so. Instead, Gibbs gave a lengthy, virtually uninterrupted narrative in which he attempted to explain his version of the attack on Parks. Thus we reject Gibbs' contention that the trial court failed to give full and fair consideration to his motion.

{¶12} Although Gibbs' withdrawal motion did not set out specific reasons to justify withdrawing his pleas beyond his belief that a "defense to the charge[s] may be presented," Gibbs attempted to elaborate on this claim at the hearing. He argued that

he was innocent of or had a complete defense to the charges against him. At the withdrawal motion hearing, Gibbs testified that on the night in question, Parks saw him pick up money off the ground and then approached him asking for dope. She also asked him about two dogs that had followed him, but he told her they were not his dogs. Parks offered to perform oral sex on him for twenty dollars, but he refused the offer. When she then begged him for the money, he became rude and she left. Later on while lying on top of his car, he felt a hand inside his pocket. When he grabbed the person's wrist, the person clawed at his eyeball. He did not know if the person was a male or female. He pulled the person to the ground and grabbed the person's hair. After someone alerted him that he was attacking a female, he let go. The person he grabbed apologized, and Gibbs noticed that his money was hanging out of his pocket. Gibbs testified that he recalled a dog growling during the encounter but he "didn't even know that this dog may have bit her or whatever." He further testified, "I don't know which one bit her, you know * * * I do remember there was a dog, but it wasn't my dog." His dog only showed up later after he "took off across the street" to avoid the police because he feared being charged with public intoxication.

{¶13} Based on this version of events, Gibbs argues that he is innocent of the second felonious assault charge because he did not knowingly cause or attempt to cause Parks physical harm by means of a deadly weapon, i.e. a dog, because he did not own the dog. Gibbs also argues that he had a defense to both felonious assault charges because he acted in self-defense. Moreover, Gibbs contends that he is innocent of failing to restrain or confine a vicious dog because he did not own the dog that allegedly attacked Parks.

{¶14} However, Gibbs never professed innocence or any defense at the change of plea hearing. By signing the "Plea of No Contest" forms, Gibbs acknowledged that he understood "the possible defense [he] might have." On cross-examination during the hearing on the withdrawal motion, Gibbs admitted that his testimony mirrored the story he gave police on the night in question with the exception of a mistake he made about his location during part of the incident, i.e. he was on top of his car instead of inside it during part of the evening. Thus this is not a case where after pleading no contest, a defendant obtained new evidence bolstering his defense or claim of innocence.

{¶15} Moreover, Gibbs candidly admitted that he was intoxicated during the initial encounter with Parks. Sometime after that, but before he felt the hand in his pocket, Gibbs testified that he grew "unconscious from drinking" and "kinda lightweight passed out. I wasn't totally blacked out, but you know I was semi-conscious and that's when the incident occurred * * *." Gibbs also contradicted his testimony that he told Parks the two dogs nearby weren't his. He testified that he "probably said you know, yeah those are mine, you know * * * I do remember doing that cause the dog, one of them was scratching on my car * * * ." Thus the only evidence supporting Gibbs' claims of innocence or possible defenses is his own self-serving and sometime contradictory testimony based on his recollection of events that occurred when he was so intoxicated he became unconscious, semi-conscious, or "kinda lightweight passed out." Under these circumstances, the trial court did not abuse its discretion by failing to find that Gibbs' claim of innocence or defenses justified permitting Gibbs to withdraw his pleas.

{¶16} Gibbs also contends that he should have been able to withdraw his pleas to the assault charges because a jury could have been instructed on lesser offenses

because Parks provoked the attack. However, Gibbs did not make this argument in his motion to withdraw or at the subsequent hearing, thus we need not address it here.

{¶17} Finally Gibbs contends that trial counsel's ineffectiveness justified withdrawal of the pleas. However, at the trial level Gibbs only generally claimed in a kite that his attorney failed to explain his "options and rights to a fair trial." But signing the "Plea of No Contest" forms, Gibbs admitted that he was "satisfied with [his] attorney's advice, counsel, and competence" at that time. And during the change of plea hearing, Gibbs told the court that he was satisfied with trial counsel's legal representation. Moreover, at the hearing on the withdrawal motion, Gibbs did not complain about his representation. Presumably he was satisfied with counsel's representation since the same attorney who represented him at the change of plea hearing represented him at the hearing on the withdrawal motion.

{¶18} In addition, at the hearing on the withdrawal motion, the trial court noted that Gibbs' counsel had practiced law for a lengthy period of time solely in the area of criminal defense and managed the county's public defender office. The court further noted that from its own personal experience, Gibbs' counsel "has handled hundreds if not thousands of criminal cases where pleas have been entered of guilty. Pleas have been entered of no contest, pleas of not guilty have been entered. He's tried countless cases and this court knows of no reason why Mr. Gibbs wasn't provided excellent representation * * *." Thus, the record indicates that Gibbs had highly effective counsel during the change of plea hearing. There is no evidence that counsel ineffectively advised him concerning the no contest pleas so as to allow him to withdraw them.

{¶19} Moreover, in his brief, Gibbs primarily complains that he should be

permitted to withdraw his pleas because of counsel's ineffective representation of him after he wanted to withdraw his pleas. He complains that counsel's withdrawal motion failed to set out specific reasons to justify the withdrawal. Gibbs also complains that instead of articulating his defenses during the hearing on the motion, trial counsel instructed him to "explain to the Judge why it is [he wanted his] pleas withdrawn[.]" It is unclear why trial counsel took this approach. The State speculates that trial counsel did not believe Gibbs had a viable defense. But regardless of the rationale, we fail to see how the trial court abused its discretion by denying what Gibbs contends is a poorly argued withdrawal motion. Gibbs' claim of counsel's ineffectiveness during the withdrawal proceedings appears more properly suited to a separate claim of ineffective assistance of counsel. But Gibbs did not separately assign counsel's ineffectiveness as error on appeal, so we need not address that issue. See App.R. 12(A)(2); App.R. 16(A)(7).

{¶20} In sum, the trial court's decision to deny the withdrawal motion was not unreasonable, unconscionable, or arbitrary. Gibbs received a full Crim.R. 11 hearing and understood the nature of the charges and possible penalties before entering his no contest pleas. Moreover, the record shows that the trial court held a full hearing on the withdrawal motion and gave full and fair consideration to the motion. Contrary to Gibbs' assertion, the record indicates that Gibbs was represented by highly competent counsel at the change of plea hearing. And although Gibbs insists that he is innocent of or had a defense to the charges against him, the only evidence supporting these claims is his own self-serving, sometimes contradictory testimony about events that occurred while he was intoxicated. Thus, the trial court did not abuse its discretion in denying the

withdrawal motion, and we overrule Gibbs' first assignment of error.

III. Defective Indictment

{¶21} In his second assignment of error, Gibbs contends that the trial court committed plain error when it accepted his no contest plea and found him guilty of failure to restrain or confine a vicious dog because the indictment omitted an essential element of the offense. See, generally, *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, at ¶7 (noting that "[i]n most defective-indictment cases in which the indictment fails to include an essential element of the charge" plain error analysis, as opposed to structural error analysis, "will be the proper analysis to apply"); Crim.R. 12(C)(2). "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). "A silent defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22, citing *United States v. Vonn* (2002), 535 U.S. 55, 59, 122 S.Ct. 1043, 152 L.Ed.2d 90.

{¶22} For a reviewing court to find plain error: (1) there must be an error, i.e., a deviation from a legal rule; (2) the error must be plain, i.e., an "obvious" defect in the proceeding; and (3) the error must have affected "substantial rights," i.e., it must have affected the outcome of the proceeding. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Furthermore, the Supreme Court of Ohio has stated that "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, at paragraph three of the syllabus.

{¶23} Section 10, Article I of the Ohio Constitution states: "[N]o person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury * * *." The Supreme Court of Ohio has declared, "The material and essential facts constituting an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury." *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, at ¶17, quoting *Harris v. State* (1932), 125 Ohio St. 257, 264, 181 N.E. 104. Moreover, a "no contest" plea is not an admission of guilt, but an admission that the facts alleged in the indictment are true. Crim.R. 11(B)(2). And if "those facts do not, in and of themselves, constitute the allegation of an offense under the statute * * * involved," i.e. they fail to allege each essential element of the offense, "the defendant has admitted to nothing upon which the court can base a conviction." *State v. Luna* (1994), 96 Ohio App.3d 207, 209, 644 N.E.2d 1056, quoting *State v. Hayes* (Jan. 14, 1983), Hancock App. No. 5-82-11, 1983 WL 7178.[2]

{¶24} Although the indictment did not state the specific subsection Gibbs allegedly violated, it purportedly charged Gibbs with violating R.C. 955.22(D), which provides:

> (D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the

[2] To the extent that *Luna* and *Hayes* declared such convictions void, we believe *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, implicitly renders them voidable.

> owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of a dangerous or vicious dog shall fail to do either of the following:
>
> (1) While that dog is on the premises of the owner, keeper, or harborer, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained;
>
> (2) While that dog is off the premises of the owner, keeper, or harborer, keep that dog on a chain-link leash or tether that is not more than six feet in length and additionally do at least one of the following:
>
> (a) Keep that dog in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;
>
> (b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, tie, or affix the leash or tether to the ground or a stationary object or fixture so that the dog is adequately restrained and station such a person in close enough proximity to that dog so as to prevent it from causing injury to any person;
>
> (c) Muzzle that dog.

{¶25} The statutory provision places different responsibilities on the owner, keeper, or harborer of a dangerous or vicious dog depending on whether the dog is on or off the premises of that individual. If the dog is on the premises of that individual, fewer restraints are required. So to obtain a conviction under R.C. 955.22(D)(2) for the failure of an owner, keeper, or harborer to comply with the heightened restraint requirements in that section, the State must show beyond a reasonable doubt that the dog was off that individual's premises when the violation occurred.

{¶26} But in this case the indictment stated in relevant part:

> Lance L. Gibbs, * * * aforesaid being the owner, keeper, harborer or handler of a dangerous or vicious dog that was not lawfully engaged in hunting or training for the purpose of hunting and accompanied by the owner, harborer, or keeper, or handler of the dog failed to muzzle and keep the dog on a chain-link leash or tether that is not over ~~than~~ six feet in

> length. Said offense having resulted in serious injury to another, in violation of Section 955.22 of the Ohio Revised Code, and against the peace and dignity of the State of Ohio.

{¶27} As the State argues and Gibbs seems to acknowledge, the only statutory subsection the indictment could implicate is R.C. 955.22(D)(2). This is the only portion of R.C. 955.22(D) that requires the owner, keeper, or harborer of the dog to use a muzzle or a leash or tether that is not more than six feet in length. But as Gibbs correctly notes, the indictment omits any reference to the location of the dog at the time he allegedly failed to restrain it. And contrary to the State's argument, just because Gibbs could discern that the indictment involved R.C. 955.22(D)(2) and look up the elements of the offense in the Revised Code does not cure the fact that a material and essential fact needed for a violation of the offense was not found by the grand jury. In other words, the error here goes beyond simple notice problems.

{¶28} We conclude that the trial court committed an obvious error affecting Gibbs' substantial rights when it found him guilty of failing to restrain or confine a vicious dog. The court made Gibbs answer for a crime charged other than on "presentment or indictment of a grand jury," in violation of Section 10, Article I of the Ohio Constitution, and then found him guilty of that crime based on his admission to facts in the indictment that were insufficient to support a conviction under R.C. 955.22(D)(2). Under these circumstances, Gibbs "admitted to nothing upon which the court [could] base a conviction." *Luna*, supra. Accordingly, we sustain Gibbs' second assignment of error.

IV. Conclusion

{¶29} We overrule Gibbs' first assignment of error. We sustain his second assignment of error, reverse Gibbs' conviction for failure to restrain or confine a vicious

dog, and remand with instructions that he be discharged accordingly.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.