

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

STATE OF OHIO,	:	
	:	Case No. 14CA3628
Plaintiff-Appellee,	:	
	:	
vs.	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
NATHAN R. PAYTON,	:	
	:	
Defendant-Appellant.	:	Released: 05/08/15

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

McFarland, A.J.

{¶1} This is an appeal from a Scioto County Common Pleas Court judgment convicting and sentencing Appellant after he pled guilty to one count of aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(1)(C). On appeal, Appellant contends that the trial court erred by failing to rule on his motion for reinstatement of the original plea agreement offer as a discovery violation sanction. Because Appellant's guilty plea forfeited his right to challenge the trial court's rulings on pretrial

motions, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶2} On July 1, 2013, Appellant, Nathan R. Payton, was indicted on one count of aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(1) and (C). The bill of particulars filed by the State provided as follows:

“On or about the 18th day of June 2013 at Kroger, Portsmouth, Scioto County, Ohio, the defendant entered the separate liquor store area inside Kroger and loaded six bottles of liquor in a backpack. Defendant then attempted to leave the store without paying for the liquor, and he was approached by two Kroger employees, Timothy Arthur and Aaron Litz. The defendant then pulled out a knife and pointed it at the two employees and told them to back off. Defendant then exited the store through the emergency exit, entered a vehicle, and then left the parking lot. Defendant was apprehended shortly thereafter, and he still had possession of the backpack filled with liquor, along with a black-handled folding knife. Upon questioning by law

enforcement, the defendant admitted to stealing the bottles of liquor.”

Appellant initially pled not guilty and the matter proceeded through discovery.

{¶3} A review of the record indicates that both Appellant and the State exchanged discovery, providing supplemental discovery responses several times. A final pretrial hearing was held on November 25, 2013, where the State offered to recommend a five-year prison term in exchange for Appellant’s agreement to plead guilty. Appellant was advised during the hearing that if the offer was rejected it would be revoked. Appellant ultimately rejected the plea offer and the State revoked the offer on the record. The next day, both Appellant and the State provided supplemental discovery. The supplemental discovery provided by the State included two additional witnesses and also two discs containing jail phone calls.

{¶4} On November 27, 2013, Appellant filed a motion requesting that the court order reinstatement of the plea offer of five years. In support of his motion, Appellant argued that upon reviewing the additional discovery that had been provided, he had inquired with the State about the original plea offer of five years, but was informed the State would now recommend a six-year sentence in exchange for his guilty plea. Appellant argued that it was

inequitable for the State to make and then revoke a final offer when he did not have all of the evidence to make his decision. The trial court did not rule on the motion and the matter proceeded to the trial scheduled to begin on December 2, 2013.

{¶5} On the day of trial, Appellant withdrew his former not guilty plea and entered a plea of guilty to aggravated robbery. Although the motion for reinstatement of the plea agreement remained pending, the court did not rule on it. Appellant was subsequently sentenced to a six-year prison term. A judgment entry of sentence was filed on February 6, 2014, however, Appellant did not immediately appeal his conviction. Appellant later filed a motion for delayed appeal with this Court on May 30, 2014, which was granted on September 11, 2014. On appeal, Appellant raises a single assignment of error for our review, as follows.

ASSIGNMENT OF ERROR

“I. THE TRIAL COURT ERRED BY FAILING TO RULE ON DEFENDANT-APPELLANT'S MOTION FOR REINSTATEMENT OF THE ORIGINAL PLEA AGREEMENT OFFER AS A DISCOVERY VIOLATION SANCTION.”

LEGAL ANALYSIS

{¶6} In his sole assignment of error, Appellant contends that the trial court erred by failing to rule on his motion for reinstatement of the original plea agreement offer as a discovery sanction violation. Appellant states that

a local rule of court¹ requires that plea agreements be accepted at final pre-trial hearings, and argues that the State "willfully manipulated discovery providing partial responses before the final pre-trial and the remainder afterward forcing [him] to plead to the indictment without a sentencing agreement having rejected a recommendation of five years at the final pretrial." [Sic]. Appellant thus argues that the trial court erred by failing to rule on his motion for reinstatement of the original plea offer.

{¶7} We initially note that the trial court did not expressly rule on Appellant's motion to reinstate the original plea offer. Although the State suggests that the trial court addressed the motion during the plea hearing, "[i]t is axiomatic that a court speaks only through its journal entries." *State ex rel. Collier v. Farley*, 4th Dist. Lawrence No. 05CA4, 2005-Ohio-4204, ¶ 18. Further, "motions that a trial court fails to explicitly rule upon are deemed denied once a court enters final judgment." *Savage v. Cody-Ziegler, Inc.*, 4th Dist. Athens No. 06CA5, 2006-Ohio-2760, ¶ 28. Also, and of importance, we note that Appellant did not go to trial, but rather he pled guilty to the sole count contained in the indictment. As such, we must

¹ Scioto County Court of Common Pleas General Division, Rules of Practice of the General Division, Effective January 1, 2004, provides in Rule XIX Criminal Case Management Plan, section (D) Scheduling Conference, subsection (2) that "[d]efendant MUST be prepared to enter plea at scheduling conference of request trial date." [Sic]

consider whether Appellant has forfeited his right to raise this argument on appeal.

{¶8} In effect, “ ‘a guilty plea waives all appealable errors except for a challenge as to whether the defendant made a knowing, intelligent, and voluntary acceptance of the plea.’ ” *State v. Neu*, 4th Dist. Adams No. 12CA942, 2013-Ohio-616, ¶ 13; quoting *State v. Patterson*, 5th Dist. Muskingum No. CT2012-0029, 2012-Ohio-5600, ¶ 30; see also *State v. Spates*, 64 Ohio St.3d 269, 272-273, 595 N.E.2d 351, paragraph two of the syllabus (1992). Here, Appellant argues that the trial court erred by failing to rule on his motion to reinstate the original plea offer, and erred in failing to order the original plea offer reinstated as a sanction for an alleged discovery violation by the State. Thus, he does not argue that his plea was not knowing, intelligent or voluntary. As such, in light of Appellant’s guilty plea, we conclude Appellant has waived his right to raise this argument on appeal.

{¶9} Further, in *State v. Portis*, 2nd Dist. Clark No. 2013-CA-53, 2014-Ohio-3641, ¶ 9-10, the court held that although the trial court must comply with Crim.R. 11(C)(2) when accepting a guilty plea, the court is not required to inform a criminal defendant “that a guilty plea will forfeit his ability to assign as error any claimed errors in pretrial rulings.” Citing *State*

v. Satterwhite, 2nd Dist. Montgomery No. 23142, 2009-Ohio-6593, ¶ 47.

Additionally, this Court recently held that a guilty plea forfeits the right to appeal the trial court's decision on a pretrial motion to suppress. *State v. Johnson*, 4th Dist. Hocking No. 14CA16, 2015-Ohio-854, ¶ 5; citing *State v. Lee*, 4th Dist. Washington No. 13CA42, 2014-Ohio-4898. Likewise, we conclude that a guilty plea forfeits the right to challenge the trial court's implicit denial of Appellant's pretrial motion to reinstate the plea agreement.

{¶10} Moreover, assuming arguendo that this argument is not waived, we fail to find a discovery violation on the part of the State which would have warranted sanctions. Crim.R. 16 governs discovery and provides in section (A) that “all parties have a continuing duty to supplement their disclosures.” Under Crim.R. 16(L)(1), “[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.” A trial court has broad discretion in determining a sanction for a discovery violation, and a trial court's decision will not be reversed absent an abuse of that discretion. See *State ex rel.*

Duncan v. Middlefield, 120 Ohio St.3d 313, 2008-Ohio-6200, 898 N.E.2d 952, ¶ 27. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶11} Although the State suggests in its appellate brief that it became aware of the jail calls after the pretrial hearing and thus disclosed them, there is no evidence in the record that these calls were newly discovered.

Likewise, there is no evidence in the record suggesting that they were not newly discovered. As such, there is no indication that the State willfully withheld the discs or that they waited to disclose them until after revocation of the plea offer. Further, because Appellant is the one who made the calls, he knew that the evidence existed and could be used against him. See *State v. Lewis*, 1st Dist. Hamilton Nos. C-840596, C-840607, 1985 WL 8865, *3 (“defendant should have moved for disclosure of the ‘statement;’ he knew of its existence. [] His failure to do so was fatal to his claim of error”). And, finally, at least one court has held that statements contained in jail phone calls are not statements within the meaning of Crim.R. 16(B)² and therefore need not be disclosed as part of discovery. *State v. Lanier*, 180 Ohio App.3d

² CrimR. 16(B)(1) requires the State to disclose recorded statements made by the defendant.

376, 2008-Ohio-6906, 905 N.E.2d 687, ¶ 8-9 (vacated in part on other grounds); citing *State v. Lewis*, supra, at *2.

{¶12} Thus, and in light of the foregoing, we conclude that Appellant, by pleading guilty, forfeited his right to challenge the trial court's ruling on pretrial motions, including his motion for reinstatement of the original plea offer and request for discovery sanctions. Further, as set forth above, assuming arguendo that Appellant's arguments are not waived, we find no merit in them. As such, Appellant's sole assignment of error is overruled. Accordingly, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto 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.

Harsha, J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative 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.