**[Cite as *State v. Murphy*, 2009-Ohio-2690.]**

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO<br><br>Plaintiff-Appellee<br><br>-vs-<br><br>TROY A. MURPHY<br><br>Defendant-Appellant | JUDGES:<br>Hon. William B. Hoffman, P.J.<br>Hon. John W. Wise, J.<br>Hon. Julie A. Edwards, J.<br><br>Case No. CT2008-0067<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Muskingum County Court of Common Pleas, Case No. CR2008-0200 |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | June 3, 2009 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
|---|---|
| ROBERT L. SMITH<br>Assistant Prosecuting Attorney<br>27 North Fifth Street<br>Zanesville, Ohio 43701 | DAVID A. SAMS<br>P.O. Box 40<br>West Jefferson, Ohio 43162 |

*Hoffman, P.J.*

**{¶1}** Defendant-appellant Troy A. Murphy appeals his conviction and sentence in the Muskingum County Court of Common Pleas. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE

**{¶2}** On August 6, 2008, the Muskingum County Grand Jury indicted Appellant one two counts of robbery, in violation of R.C. 2911.02(A)(2), and two counts of theft, in violation of R.C. 2913.02.

**{¶3}** Pursuant to a plea agreement, on October 15, 2008, Appellant entered a plea of guilty to the charges in exchange for the State's recommendation he receive a four year prison sentence on the two counts of robbery, to be served consecutively, and one year on the first count of theft to be served concurrent to the eighteen month recommendation on the second count of theft. According to the plea agreement, both robbery counts were amended to third degree felonies, in violation of R.C. 2911.02(A)(3). Following a colloquy, the trial court accepted Appellant's plea, and ordered a presentence investigation be conducted.

**{¶4}** On November 17, 2008, the trial court sentenced Appellant to an aggregate prison term of eight years, as recommended by the State in accordance with the plea agreement.

**{¶5}** Appellant now appeals, assigning as error:

**{¶6}** "I. THE DEFENDANT-APPELLANT'S PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

TO THE UNITED STATES CONSTITUTION BECAUSE HE WAS NOT ADVISED THAT HE WAS WAIVING HIS CONSTITUTIONAL RIGHT TO JURY UNANIMITY.

**{¶7}** "II. THE DEFENDANT-APPELLANT'S CONVICTION IS VOID UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE HE PLED TO AN OFFENSE FOR WHICH HE HAD NOT BEEN INDICTED."

I

**{¶8}** In the first assignment of error, Appellant argues this plea was not voluntary, knowing, or intelligent because the trial court failed to advise him the Ohio Constitution requires a jury render a unanimous verdict in a criminal case.

**{¶9}** However, it is Ohio Criminal Rule 31, rather than the United States or Ohio Constitutions, which requires a jury render a unanimous verdict in a criminal case. The Sixth Amendment to the United States Constitution, and Section 5, Article I of the Ohio Constitution only grant and protect the right to a trial by jury.

**{¶10}** Ohio Criminal Rule 23(A) allows a defendant to waive his right to trial by jury, providing the waiver is made knowingly, intelligently, voluntarily, and in writing.

**{¶11}** Further, R.C. 2945.05, provides:

**{¶12}** "In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I _____, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the

Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

**{¶13}** "Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial."

**{¶14}** In this matter, written plea agreement signed by Appellant reads:

**{¶15}** "I understand by pleading guilty I give up my right to a jury trial or court trial, where I could confront and have my attorney question witnesses against me, and where I could use the power of the Court to call witnesses to testify for me. I know at trial I would not have to take the witness stand and could not be forced to testify against myself and that no one could comment if I chose not to testify. I understand I waive my right to have the prosecutor prove my guilt beyond a reasonable doubt on every element of each charge."

**{¶16}** At the hearing in this matter the following exchange occurred:

**{¶17}** "The court: Do you also understand by pleading guilty you are giving up the right to a jury trial?

**{¶18}** "The Defendant: Yes, sir.

**{¶19}** "The Court: You also understand you are giving up your right to a trial to the Court without a jury?

**{¶20}** "The Defendant: Yes, sir."

**{¶21}** Tr. at p. 10.

**{¶22}** In *State v. Jells*, (1990), 53 Ohio St.3d 22, the Ohio Supreme Court held:

**{¶23}** "There is no requirement in Ohio [citation omitted] for the trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. See *State v. Morris* (1982), 8 Ohio App.3d 12, 14, 8 OBR 13, 15-16, 455 N.E.2d 1352, 1355. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so. Since the executed waiver in this case complied with all of the requirements of R.C. 2945.05, and counsel was present at the signing of the waiver, we find no error."

**{¶24}** In *State v. Williams*, Muskingum App. No. CT2008-0001, 2008 Ohio 3903, this Court addressed the issue raised herein:

**{¶25}** "On appeal, appellant asserts his guilty plea was not voluntary, knowing, or intelligent, because the trial court failed to inform him of his constitutional right to a unanimous jury verdict.

**{¶26}** "In *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, the Ohio Supreme Court reviewed a defendant's claim the trial court did not adequately inform him of his rights. *Ketterer* cited *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, wherein paragraph one of the syllabus, the court held there was no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprised of the right to a jury trial. The *Ketterer* court explained the trial court was not required to specifically advise the defendant on the need for jury unanimity, *Ketterer,* supra at paragraph 68., citing *State v. Bays* (1999), 87 Ohio St.3d

15, 716 N.E.2d 1126, which in turn cited *United States v. Martin* (C.A.6 1983), 704 F.2d 267. In *Bays,* the Supreme Court held "a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it," *Ketterer,* paragraph 68.

**{¶27}** "In *State v. Fitzpatrick,* 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 76, the Supreme Court held an accused need not be told the jury verdict must be unanimous in order to convict. Appellant asks us to find in his favor notwithstanding the Supreme Court precedent, but this court must apply Ohio law as directed by the Supreme Court. We have reviewed the record, and we find the trial court and the plea form adequately explained appellant's constitutional rights."

**{¶28}** *Williams*, supra.

**{¶29}** Based upon the above, we overrule Appellant's first assignment of error.

II

**{¶30}** In his second assignment of error, Appellant maintains his conviction is void as he entered a plea of guilty to an offense for which he had not been indicted. Appellant argues his indictment for two counts of robbery, in violation of R.C. 2911.02(A)(2), did not include the default element of recklessness required under R.C. 2901.21(B) and *State v. Colon* (2008), 118 Ohio St.3d 26, 2008 Ohio 1624. Appellant asserts R.C. 2911.02(A)(3) is not a lesser included offense of either 2911.02(A)(1) or (2).

**{¶31}** This Court addressed the identical issue raised herein in *State v. Patterson,* Muskingum App. No. CT2008-0054, 2009-Ohio-273:

**{¶32}** "Because the amendment was part of a negotiated plea agreement, it matters not whether the amended charge was a lesser-included offense of the original charge. To hold otherwise violates the invited error doctrine. Furthermore, by not objecting to the amendment before the guilty plea was entered, Appellant has waived his right to assert error therein.

**{¶33}** "Finally, we note Crim. R. 11(F) contemplates such an amendment in negotiated pleas in felony cases. It provides:

**{¶34}** " 'When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.'

**{¶35}** "Accordingly, an amendment in negotiated plea felony cases is not limited to lesser included offenses."

**{¶36}** Based upon this Court's holding in *Patterson*, supra, Appellant's second assignment of error is overruled.

**{¶37}** Appellant's conviction and sentence in the Muskingum County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Edwards, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | |
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| Plaintiff-Appellee | : | |
| | : | |
| -vs- | : | JUDGMENT ENTRY |
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| TROY A. MURPHY | : | |
| | : | |
| Defendant-Appellant | : | Case No. CT2008-0067 |

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Julie A. Edwards
HON. JULIE A. EDWARDS