[Cite as *State v. Hale*, 2009-Ohio-3110.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- REX A. HALE Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Julie A. Edwards, J. Case No. CT2008-0041 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. CR2008-0083
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 24, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX PROSECUTING ATTORNEY ROBERT L. SMITH ASSISTANT PROSECUTOR 27 North Fifth Street Zanesville, Ohio 43701	DAVID A. SAMS Post Office Box 40 West Jefferson, Ohio 43162

Wise, J.

{¶1} Appellant Rex A. Hale appeals from his conviction, in the Muskingum County Court of Common Pleas, for tampering with evidence. The relevant facts leading to this appeal are as follows.

{¶2} On March 20, 2008, appellant was indicted by the Muskingum County Grand Jury on one count of Tampering with Evidence, in violation R.C. 2921.12(A)(1). The charge stemmed from appellant's role in disposing of the purse of a female passenger who died following an automobile accident.

{¶3} Subsequent to the indictment, appellant agreed to plead guilty to the above charge in exchange for the State's recommendation that he serve two years in prison. Appellant signed a written plea agreement to that effect.

{¶4} On June 6, 2008, the appellant appeared in court with counsel and pled guilty to count three of the indictment, Tampering with Evidence. At that time, a colloquy took place between appellant and the trial court; it is undisputed the court did not advise appellant of the requirement that he be convicted by the unanimous verdict of a jury.[1] Appellant's plea was accepted and a pre-sentence investigation was ordered.

{¶5} On July 14, 2008, appellant returned to the court for sentencing. The court thereupon sentenced appellant to a prison term of five years, rather than two years as recommended by the State in accordance with the agreement of the parties.

{¶6} On August 13, 2008, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

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[1] Appellant responded in the affirmative to the following question by the trial court: "Do you also understand by pleading guilty you are giving up your right to a jury trial?" Tr., June 6, 2008, at 8.

{¶7} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS AS HIS PLEA WAS UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY.

{¶8} "II. THE DEFENDANT-APPELLALNT'S (SIC) CONVICTION IS VOID DUE TO A DEFECTIVE INDICTMENT.

{¶9} "III. THE DEFENDANT-APPELLANT'S SENTENCE IS CONTRARY TO LAW."

I.

{¶10} In his first Assignment of Error, appellant contends the trial court failed to ensure that his guilty plea was knowing, voluntary, and intelligent, where appellant was not informed of his right to have the State obtain a unanimous jury verdict. We disagree.

{¶11} Crim.R. 11(C)(2)(a) reads as follows:

{¶12} "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

{¶13} "(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶14} In accepting a guilty plea, a trial court must substantially comply with Crim.R. 11. *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. Substantial compliance with Crim.R. 11(C) is determined upon a review of the totality of the circumstances. *State v. Carter* (1979), 60 Ohio St.2d 34, 38. Crim.R. 23(A) allows a defendant to waive his right to trial by jury in serious offense cases provided that the

waiver is made knowingly, intelligently, and voluntarily, and in writing. Additionally, R.C. 2945.05 provides, in pertinent part:

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

{¶16} Furthermore, written waivers are presumptively voluntary, knowing, and intelligent. *State v. Bays* (1999), 87 Ohio St.3d 15, 716 N.E.2d 1126, 1999-Ohio-216.

{¶17} The treasured right of Ohioans to a trial by jury is granted and protected by the Sixth Amendment to the United States Constitution, as well as Section 5, Article I of the Ohio Constitution. " *** [T]there is nothing to be gained, and there is everything to lose, by infringing upon the sacred and fundamental right to trial by jury." *Gladon v. Greater Cleveland Regional Transit Auth*. (1996), 75 Ohio St.3d 312, 343, 662 N.E.2d 287, 1996-Ohio-137, Douglas, J., dissenting. In Ohio, the unanimity requirement in criminal cases is conveyed in Crim.R. 31(A), which provides: "The verdict shall be unanimous."

{¶18} In *State v. Fitzpatrick* (2004), 102 Ohio St. 3d 321, 810 N.E.2d 927, 2004-Ohio-3167, the Ohio Supreme Court addressed some of the issues before us. The defendant-appellant in that case contended "that his waiver was not knowing and intelligent, because the trial court did not advise him that a jury's verdict must be

unanimous, both to convict and to impose the death penalty." Id. at 326. The Ohio Supreme Court rejected this argument, stating that there "is 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." Id. Further, the Court emphasized that "a defendant need not have a complete or technical understanding of the jury trial right in order to waive it." Id. at 327, citing *United States v. Martin* (C.A. 6 1983), 704 F.2d 267.

{¶19} This Court has also rejected the present argument in *State v. Williams* (July 31, 2008), Muskingum App. No. CT2008-0001, and *State v. Imani*, Muskingum App.No. CT2008-0014, 2008-Ohio- 4364, ¶12.

{¶20} The record in the case sub judice reveals appellant waived his right to a trial by jury as a consequence of entering into a plea agreement with the State of Ohio. The written plea agreement, which was signed by appellant, defense counsel, and the assistant prosecutor, contained provisions which advised appellant of his right to trial by jury and which expressed the appellant's desire to waive such right. Furthermore, the trial court expressly addressed the waiver of the right to trial by jury at the plea hearing. Tr. at 8.

{¶21} Accordingly, upon review, we hold appellant's guilty plea was knowingly, voluntarily, and intelligently entered, and the trial court did not err in accepting the plea. Appellant's First Assignment of Error is overruled.

II.

{¶22} In his Second Assignment of Error, appellant challenges the validity of his original conviction on the basis of an allegedly defective indictment on the charge of tampering with evidence.

{¶23} In *State v. Colon,* 118 Ohio St.3d 26, 885 N.E.2d 917, 2008-Ohio-1624, the Ohio Supreme Court held that an indictment for robbery in violation of R.C. 2911.02(A)(2), which omitted an essential element of the crime by failing to charge a mens rea (i.e., that the defendant *recklessly* inflicted, attempted to inflict, or threatened to inflict physical harm), resulted in a structural error which was not waived by the defendant's failure to raise that issue in the trial court.

{¶24} However, as we noted in *State v. Vance,* Ashland App. No.2007-COA-035, 2008-Ohio-4763, ¶ 51, the Supreme Court has reconsidered its position in *Colon I.* See *State v. Colon ("Colon II"),* 119 Ohio St.3d 204, 893 N.E.2d 169, 2008-Ohio-3749. In *Colon II,* the Court held:

{¶25} "Applying structural-error analysis to a defective indictment is appropriate only in rare cases, such as *Colon I,* in which multiple errors at the trial follow the defective indictment. In *Colon I,* the error in the indictment led to errors that 'permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence.' *Id .* at ¶ 23, 885 N.E.2d 917, citing *State v. Perry,* 101 Ohio St.3d 118, 802 N.E.2d 643, 2004-Ohio-297, at ¶ 17. Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim. R. 52(B) plain-error analysis. * * *." *Id.* at ¶ 8, 802 N.E.2d 643, 119 Ohio St.3d 204, 893 N.E.2d 169.

{¶26} Appellant specifically contends that his indictment contained no mens rea for the charge of evidence tampering, which he alleges would be the culpable mental state of "recklessness" pursuant to R.C. 2901.21(B). As the State notes in its response,

in the case sub judice, appellant's guilty plea means in practical terms that there was no improper jury instruction and no improper argument to a jury, as would weigh in a *Colon* analysis. Cf. *State v. Johnson*, Stark App.No. 2008-CA-00110, 2009-Ohio-105, ¶43. Furthermore, in *State v. Gant,* Allen App.No. 1-08-22, 2008-Ohio-5406, ¶ 13, the Third District Court of Appeals found that any *Colon*-type error in an indictment is waived when a defendant pleads guilty, as *Colon* did not overrule the longstanding waiver rules with regard to guilty pleas.

{¶27} In accordance with *Johnson* and *Gant*, we find appellant's arguments must be confined to a plain error standard. In order to find plain error under Crim. R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. See *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to "prevent a manifest miscarriage of justice." *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (citations omitted). Under the circumstances of this case, we find the holding of *Colon I* inapplicable and find no demonstration of plain error.

{¶28} Appellant's Second Assignment of Error is therefore overruled.

III.

{¶29} In his Third Assignment of Error, appellant contends his sentence is contrary to law. We disagree.

{¶30} In the case sub judice, appellant entered a plea of guilty to Count Three of the indictment, which charged him with one count of Tampering with Evidence (R.C. 2921.12(A)(1)). The court thereupon sentenced appellant to a stated prison sentence of

five (5) years. The specific issue before us whether the trial court erred in sentencing appellant to a "more than minimum" sentence, in spite of the agreement of the parties to recommend a lesser sentence to the Court.

{¶31} Following the Ohio Supreme Court's decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, judicial fact finding is no longer required before a court imposes non-minimum, maximum or consecutive prison terms. *State v. Hanning*, Licking App.No. 2007CA00004, 2007-Ohio-5547, ¶9. Thus, pursuant to *Foster,* trial courts have full discretion to impose a prison sentence within the statutory ranges. The *Foster* decision does, however, require trial courts to "consider" the general guidance factors contained in R.C. 2929.11, and R.C. 2929.12. *State v. Duff,* Licking App. No. 06-CA-81, 2007-Ohio-1294. See also, *State v. Diaz,* Lorain App. No. 05CA008795, 2006-Ohio-3282.

{¶32} Appellant herein was convicted of one felony of the third degree, which carries a potential determinate sentence of one to five years in one-year increments. Upon review, we find nothing in the record that would suggest that the court selected the sentence arbitrarily, based the sentence on impermissible factors, or failed to consider permissible factors. We are thus unable to conclude, under an abuse of discretion standard, that the court acted unreasonably, arbitrarily, or unconscionably in its sentencing.

{¶33} Appellant's Third Assignment of Error is overruled.

{¶34} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Edwards, J., concur.

/S/ JOHN W. WISE

/S/ WILLIAM B. HOFFMAN

/S/ JULIE A. EDWARDS

JUDGES

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

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
REX A. HALE	:	
Defendant-Appellant	:	Case No. CT2008-0041

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

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

/S/ JULIE A. EDWARDS_____

JUDGES