[Cite as *State v. Lathan*, 2010-Ohio-4540.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 09-CA-42
MAURICE D. LATHAN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Guernsey County Court of Common Pleas, Case No. 07CR162
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 23, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
DANIEL G. PADDEN GUERNSEY COUNTY PROSECUTING ATTORNEY 139 West 8th St. Box 640 Cambridge, OH 43725	MAURICE D. LATHAN Inmate No. 567385 C/O SCI 5900 B.I.S. Road Lancaster, OH 43130

Gwin, P.J.

{¶1} Defendant-appellant Maurice D. Lathan appeals from the October 26, 2009 Judgment Entry of the Guernsey County Court of Common Pleas overruling his Motion to Withdraw Guilty Plea. Plaintiff-appellee is the State of Ohio.

Statement of the Facts and Case[1]

{¶2} On August 30, 2007 an Affidavit for Complaint was filed in the Cambridge Municipal Court charging appellant with one count of possession of cocaine in an amount greater than 100 grams but less than 500 grams in violation of R.C. 2925.11(C)(4)(d), a felony of the second degree, and one count of possession of crack cocaine in an amount greater than 100 grams but less than 500 grams in violation of R.C. 2925.11(C)(4)(f), a felony of the first degree.

{¶3} On August 30, 2007 appellant filed a written waiver of his right to a preliminary hearing and the case was bound over to the Guernsey County Grand Jury.

{¶4} On August 31, 2007, appellant's attorney filed a "Notice of Appearance" in Guernsey County Court of Common Pleas, Case No. 07 CR 162.

{¶5} A bond hearing was held on the Court's own motion with appellant and his attorney appearing in open court on September 27, 2007. On October 3, 2007, appellant's trial attorney filed a "Request for Discovery."

{¶6} On October 22, 2007, a Bill of information was filed charging appellant with one count of possession of cocaine in an amount greater than 100 grams but less than 500 grams, a felony of the second degree, and one count of possession of crack cocaine in an amount greater than 10 grams but less than 25 grams, a felony of the

[1] A Statement of the Facts underlying appellant's conviction is unnecessary to our disposition of this case; therefore, such shall not be included herein.

second degree. Each count contained a specification for the forfeiture of $66,250.00 cash pursuant to R.C. 2929.13.

{¶7} On November 6, 2007 appellant filed a written waiver of prosecution by indictment and consent to prosecution by information. The written waiver stated,

{¶8} "I, Maurice D. Lathan, defendant in the above cause, having been advised by the Court of the nature of the charge against me, and of my rights under the Constitution, and being represented by counsel, do hereby waive in writing and in open Court, prosecution by indictment, and consent to prosecution by information in Common Pleas Court." Appellant and the trial judge signed the entry.

{¶9} Appellant thereafter filed a written plea of guilty, which contains the following, "PSI to be ordered. Negotiated sentence of 5 yrs. On each count, to be served consecutive to each other. Mandatory fine & court costs to be taken from forfeited monies…." Appellant, his attorney and the prosecuting attorney signed this entry. Appellant entered a guilty plea to the Bill of Information in open court on November 6, 2007.

{¶10} On December 14, 2007, the trial court sentenced appellant in accordance with the negotiated sentence.

{¶11} On August 28, 2009, appellant filed a Motion to Withdraw Guilty Plea. On September 8, 2009, appellant filed a Motion for Post-Conviction Relief. Appellant's motions were denied on October 26, 2009.

{¶12} It is from the trial court's judgment entry of October 26, 2009 that appellant has filed this appeal raising as his assignments of error:

{¶13} "I. TRIAL COURT ABUSED ITS DISCRETION AND DEPRIVED APPELLANT OF DUE PROCESS WHEN TRIAL COURT ERRED BY DENYING APPELLANT'S POST SENTENCE MOTION TO WITHDRAW PLEA; ALONG WITH FAILING TO HOLD AN EVIDENTIARY HEARING WHEN BURDEN OF MANIFEST OF INJUSTICE WAS MET VIA VOID CONVICTION & SENTENCE FOR LACK OF JURISDICTION. [sic.]

{¶14} "II. TRIAL COURT ERRED BY DENYING APPELLANT'S POST CONVICTION RELIEF."

I.

{¶15} In his first assignment of error appellant maintains that the trial court erred in refusing to allow appellant to withdraw his negotiated guilty plea. We disagree.

{¶16} Crim. R. 11 requires guilty pleas to be knowingly, intelligently and voluntarily made. Although literal compliance with Crim. R. 11 is preferred, substantial, not strict, compliance with Crim. R. 11 is required. *State v. Stewart* (1977), 51 Ohio St. 2d 86.

{¶17} The question of an effective waiver of a Federal Constitutional right in a State criminal proceeding is governed by Federal standards. *Boykin v. Alabama* (1969), 395, U.S. 238. (Citing *Douglas v. Alabama* (1965) 380 U.S. 415). For a waiver to be valid under the Due Process clause of the United States Constitution, it must be: "[a]n intentional relinquishment or abandonment of a known right or privilege." *Boykin*, supra, 395 U.S. at 243 n.5 (Quoting *Johnson v. Zerbst* (1938), 304 U.S. 458).

{¶18} A plea of guilty constitutes a complete admission of guilt. Crim. R. 11 (B) (1). "By entering a plea of guilty, the accused is not simply stating that he did the

discreet acts described in the indictment; he is admitting guilt of a substantive crime." *United v. Broce* (1989), 488 U.S. 563, 570, 109 S.Ct. 757, 762.

{¶19} With respect to statements made during change of plea hearings, the United States Supreme Court has stated, "the representation of the defendant, his lawyer, and the prosecutor in such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Machibroda v. United States* (1962), 368 U.S. 487, 497, 82 S.Ct. 510, 515. Although the plea or sentencing proceedings record is imposing, it is not insurmountable. Id.

{¶20} Crim. R. 32.1: states: "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentences is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

{¶21} Because appellant's request was made post-sentence, the standard by which the motion was to be considered by the trial court was "to correct manifest injustice." The accused has the burden of showing a manifest injustice warranting the withdrawal of a guilty plea. *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph one of the syllabus.

{¶22} In *Smith*, supra, the Ohio Supreme Court, citing *United States v. Semel* (C.A. 4, 1965), 347 F.2d 228, addressed the concept of "manifest injustice," stating that

"[t]his term [manifest injustice] has been variously defined, but it is clear that under such standard, a post sentence withdrawal motion is allowable only in extraordinary cases." Id. at 264.

{¶23} Furthermore, "[b]efore sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. * * * " *State v. Peterseim* (1980), 68 Ohio App.2d 211, 213, 428 N.E.2d 863, quoting *Kadwell v. United States* (C.A.9, 1963), 315 F.2d 667.

{¶24} "A hearing on a post-sentence Crim.R. 32.1 motion is not required if the facts alleged by the defendant and accepted as true by the trial court would not require the court to permit a guilty plea to be withdrawn." *State v. Wynn* (1998), 131 Ohio App.3d 725, 728, 723 N.E.2d 627, 629; *State v. Blatnik* (1984), 17 Ohio App.3d 201, 204, 478 N.E.2d 1016, 1020.

{¶25} A reviewing court will not disturb a trial court's decision whether to grant a motion to withdraw a plea absent an abuse of discretion. *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶26} The basis for appellant's request is alleged procedural defects in the information, timing of the information and ineffective assistance of counsel.

{¶27} Specifically, appellant argues that, because the Bill was filed *before* the Appellant signed a waiver of indictment, rather than within the fourteen-day period *after* that waiver was filed, the charges and sentence entered against him are void. Further, appellant claims that the information was not witnessed and notarized by the Clerk of Courts.

{¶28} The fact that the return of an indictment to charge one with a crime is a constitutional right does not prevent its waiver. Constitutional rights, as any other rights, may be waived. As was said in *Yakus v. United States*, 321 U.S. 414, at 444, 64 S.Ct. 660, at 677,

{¶29} "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. * * *"

{¶30} Thus, it has been held that an accused may waive the right to an indictment (*Ex parte Stephens*, 171 Ohio St. 323, 170 N.E.2d 735; *Smith v. United States*, 360 U.S. 1, 79 S.Ct. 991, 3 L.E.2d 1041); right to counsel (*Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461); right to public trial (*Singer v. United States*, 380 U.S. 24, 35, 85 S.Ct. 783, 13 L.Ed.2d 630); right to trial by jury (*Patton v. United States*, 281 U.S. 276, 290, 50 S.Ct. 253, 74 L.Ed. 854); and right to confrontation of witnesses (*Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314).

{¶31} The manner by which an accused is charged with a crime, whether by indictment returned by a grand jury or by information filed by the prosecuting attorney,

is procedural rather than jurisdictional. *Wells v. Maxwell* (1963), 174 Ohio St. 198, 200, 22 O.O.2d 147, 148, 188 N.E.2d 160, 161; *Ex parte Stephens* (1960), 171 Ohio St. 323, 324, 14 O.O.2d 1, 2, 170 N.E.2d 735, 737.

{¶32} We note that by voluntarily entering a guilty plea, a defendant waives the right to contest non-jurisdictional defects that occurred before the plea was entered. *State v. Kelley* (1990), 57 Ohio St.3d 127, 566 N.E.2d 658. More specifically, by voluntarily entering a guilty plea, appellant waived his right to a direct appeal of any alleged defects in the information. See, *Stacy v. Van Coren* (1969), 18 Ohio St.2d 188, 248 N.E.2d 603; *State v. Hill* (Feb. 4, 1993), Cuyahoga App. No. 61685.

{¶33} In *Stacy,* supra, the defendant was indicted for assault with intent to commit rape. During the plea hearing, the defendant pled guilty to assault with intent to commit robbery. He subsequently brought an action in habeas corpus. There was no question the court had jurisdiction over both the defendant and the subject matter of the crime. In denying the writ and upholding the conviction, the *Stacy* court explained:

{¶34} "The petitioner's actions under the circumstances of this case, in voluntarily entering a plea of guilty while represented by counsel, constituted a waiver of his constitutional right to indictment or information. Although such procedure may be erroneous it does not affect the validity of his conviction." *Stacy,* supra, at 189, 248 N.E.2d 603**,** citing *Midling v. Perrini* (1968), 14 Ohio St.2d 106, 236 N.E.2d 557, at syllabus ("Where a defendant, while represented by counsel, pleads guilty to an offense and is sentenced, the judgment of conviction cannot be collaterally attacked on the ground that the indictment fails to state one or more essential elements of the offense").

{¶35} R.C. 2941.021 provides that "[a]ny criminal offense which is not punishable by death or life imprisonment may be prosecuted by information filed in the common pleas court by the prosecuting attorney if the defendant, after he has been advised by the court of the nature of the charge against him and of his rights under the constitution, is represented by counsel or has affirmatively waived counsel by waiver in writing and in open court, waives in writing and in open court prosecution by indictment." Appellant was not charged with any crimes punishable by death or life imprisonment, and he signed a waiver of indictment in compliance with R.C. 2941.021.

{¶36} A bill of information is sufficient if it indicates (1) that it is entitled in a court having authority to receive it; (2) that it was subscribed and presented to the court by the prosecuting attorney of the county in which the court was held; (3) the defendant's name; (4) that the offense was committed at some place within the jurisdiction of the court; and (5) that the offense was committed at some time prior to the time of filing of the information. R.C. 2941.03.

{¶37} The bill of information filed by the state complies with R.C. 2941.03. Notably, R.C. 2941.03 does not require the state to attach an affidavit or complaint from the victim. Because the bill of information contains all of the requisite information and charges appellant with crimes committed in Guernsey County, the trial court clearly had jurisdiction in this case. *State v. Azan*, Butler App. No. CA 2003-09-247, 2004-Ohio-3347 at ¶16-17; *State v. Dotson,* Washington App. No. 03CA53, 2004-Ohio-2768, ¶ 15.

{¶38} In the case at bar, appellant has not provided this court with a transcript of the change of plea and sentencing hearings. In *Knapp v. Edwards Laboratories* (1980),

61 Ohio St.2d 197, 199, the Supreme Court of Ohio held the following: “[t]he duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St. 2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that ‘ * * *the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.* * *.’ When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm.”(Footnote omitted.)

{¶39} Without a transcript of the proceedings, appellant cannot demonstrate any error or irregularity in connection with the trial court's decision. *Knapp v. Edwards* Laboratories (1980), 61 Ohio St. 2d 197, 199, 400 N.E.2d 384. A presumption of regularity applies to the trial court's acceptance of appellant’s plea, and appellant has shown us nothing to overcome the presumption.

{¶40} Further, under the doctrine of “invited error,” it is well settled that “a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make.” *State ex rel. Smith v. O'Connor* (1995), 71 Ohio St.3d 660, 663, citing *State ex rel. Fowler v. Smith* (1994), 68 Ohio St.3d 357, 359. See, also, *Lester v. Leuck* (1943), 142 Ohio St. 91, paragraph one of the syllabus. As the Ohio Supreme Court has stated:

{¶41} "The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct the same to cause his exceptions to be noted. It follows, therefore, that, for much graver reasons, a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." *Lester* at 92-93, quoting *State v. Kollar* (1915), 142 Ohio St. 89, 91; *Walker v. State*, Stark App. No.2007CA00037, 2007-Ohio-5262 at ¶ 48-52.

{¶42} In the case at bar, appellant negotiated a sentence before entering his plea. Counsel at all times represented appellant. Appellant was sentenced in accordance with his agreement. Appellant has not explained why he waited nearly three (3) years after he entered his plea before filing his motion to withdraw the plea based upon defects in the bill of information.

{¶43} Appellant's first assignment of error is overruled.

II.

{¶44} In his second assignment of error, appellant contends the trial court erred when it denied his petition for post conviction relief without an evidentiary hearing. We disagree.

{¶45} Initially we note appellant has failed to properly brief this assignment of error. App.R. 16(A)(7) states that an appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the

authorities, statutes and parts of the record on which appellant relies." “It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record.” *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). “It is not the function of this court to construct a foundation for [an appellant’s] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal.” *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60,682 N.E.2d 1006, 1008; *State v. Snyder*, Licking App. No. 2008-CA-25, 2009-Ohio-2473 at ¶ 30.

{¶46} According to App. R. 12(A) (2): "The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A)."

{¶47} An appellate court may rely upon App.R. 12(A) in overruling or disregarding an assignment of error because of "the lack of briefing" on the assignment of error. *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159, 519 N.E.2d 390, 392-393. "Errors not treated in the brief will be regarded as having been abandoned by the party who gave them birth." *Uncapher v. Baltimore & Ohio Rd. Co*. (1933), 127 Ohio St. 351, 356, 188 N.E. 553, 555.

{¶48} In the alternative, we find the trial court did not err in denying appellant’s petition for post conviction relief filed nearly three years after sentencing.

{¶49} The pertinent jurisdictional time requirements for a post conviction petition are set forth in R.C. 2953.21(A) (2) as follows: “A petition under division (A) (1) of this section shall be filed no later than one hundred eighty days after the date on which the

trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication * * *." In order for a court to recognize an untimely post conviction petition, both of the following requirements must apply (R.C. 2953.23(A) (1)):

{¶50} "(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶51} "(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable fact finder would have found the petitioner eligible for the death sentence."

{¶52} There is no question that appellant's motion was filed more than 180 days after the expiration of the time for filing an appeal. Thus, the issue is whether appellant can satisfy both of the requirements set forth in R.C. 2953.23(A) (1).

{¶53} Appellant cannot establish that he was unavoidably prevented from discovering the factual basis for his claim that the information was defective because any defect existed on the face of the information. Appellant cannot satisfy R.C. 2953.23(A) (1) (b). By its terms, the statute only allows extension of the 180-day period for filing a post-conviction petition where the petitioner is challenging the petitioner's

convictions or is challenging the imposition of the death penalty. *State v. Backus,* 10th Dist. No. 06AP-813, 2007-Ohio1815.

{¶54} In the case sub judice, appellant made no allegation that his untimely petition fell under the exceptions outlined in R.C. 2953.23(A) (1), let alone establish by clear and convincing evidence the requirements therein. See, *Griffith*, supra at 18-19; State *v. Cleveland*, Lorain App. No. 08CA09406, 2009-Ohio-397 at ¶ 53.

{¶55} Because appellant cannot establish both of the grounds for extension of the time for filing a timely petition for post-conviction relief, the trial court did not err in dismissing appellant's petition.

{¶56} Appellant's second assignment of error is denied.

{¶57} For the reasons stated in the foregoing opinion, the decision of the Court of Common Pleas, Guernsey County, is hereby affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____
HON. PATRICIA A. DELANEY

WSG:clw 0917

[Cite as *State v. Lathan*, 2010-Ohio-4540.]

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MAURICE D. LATHAN	:	
Defendant-Appellant	:	CASE NO. 09-CA-42

For the reasons stated in our accompanying Memorandum-Opinion, the decision of the Court of Common Pleas, Guernsey County, is hereby affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

_____
HON. PATRICIA A. DELANEY