COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
PATRICK SHAWN HILLIARD	:	Case No. 2014CA00147
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Stark County Court
                                                              of Common Pleas, Case No. 2010-
                                                              CR-1434(B)

JUDGMENT: Affirmed

DATE OF JUDGMENT: April 27, 2015

APPEARANCES:

For Plaintiff-Appellee   For Defendant-Appellant

JOHN D. FERRERO   PATRICK HILLIARD, pro se
Prosecuting Attorney   Inmate No. 624-399
                                                              Richland Correctional Institution
By: KATHLEEN O. TATARSKY   P.O. Box 8107
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Baldwin, J.

{¶1}   Appellant Patrick Shawn Hilliard appeals a judgment of the Stark County Common Pleas Court overruling his motion to withdraw a guilty plea. Appellee is the State of Ohio.

<u>STATEMENT OF FACTS AND CASE</u>

{¶2}   In 2010, appellant was indicted with tampering with evidence, grand theft of a motor vehicle, arson, breaking and entering, and unauthorized use of a vehicle. According to the Bill of Particulars, appellant and a co-defendant stole a Hummer, buried it in a ravine, and then set it on fire. The Bill further alleged that they operated a Chevrolet Cobalt without the consent of the owner.

{¶3}   Appellant entered a plea of guilty to all charges and was sentenced to community control. He did not file an appeal from his conviction and sentence.

{¶4}   On January 23, 2012, appellant's probation officer filed a motion to revoke his community control. Following a hearing, his community control was revoked and he was sentenced to a total of six years in prison. Appellant did not file an appeal.

{¶5}   Appellant filed a motion to withdraw his guilty pleas on July 3, 2014. The trial court denied the motion, finding that appellant did not demonstrate a manifest injustice pursuant to Crim. R. 32.1.

{¶6}   Appellant assigns two errors:

{¶7}   "I. AS THE DEFECTIVE INDICTMENT WAS A STRUCTURAL ERROR THAT 'PERMEATED 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 GUILTY OR INNOCENCE,' THE DEFENDANT'S CONVICTION HAD TO BE REVERSED.

{¶8} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT SPECIFICALLY INQUIRING AS TO WHETHER THE APPELLANT WANTED TO MAKE A STATEMENT REGARDING HIS POSSIBLE SENTENCE: PRIOR TO THE IMPOSITION OF SENTENCE."

I.

{¶9}   Appellant argues that the indictment was defective because it did not state the mens rea which the State was required to prove, and that counsel was ineffective for failing to raise this issue.

{¶10} Crim. 32.1 provides:

{¶11} "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."

{¶12} A motion made pursuant to Crim.R. 32.1 is addressed to the sound discretion of the trial court. *State v. Smith*, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977). A criminal defendant cannot raise any issue in a postsentence motion to withdraw a guilty plea that was or could have been raised at trial or on direct appeal*, State v. Brown*, 167 Ohio App.3d 239, 242, 2006-Ohio-3266, 854 N.E.2d 583, 586, ¶ 7 (10th Dist.)

{¶13} Appellant could have raised any alleged defect in the indictment on direct appeal, and having failed to do so, the issue is now res judicata.

{¶14} Further, appellant's reliance on *State v. Colon*, 118 Ohio St. 3d 26, 885 N.E.2d 917, 2008-Ohio-1624, is misplaced. The Supreme Court overruled *Colon* in *State v. Horner*, 125 Ohio St. 3d 466, 935 N.E.2d 26, 2010-Ohio-3830. An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state. *Id.* at syllabus 1. As the indictment in the instant case tracks the statutory language of the offenses, the indictment was not defective, and the trial court did not abuse its discretion in overruling appellant's motion to withdraw his guilty pleas.

{¶15} The first assignment of error is overruled.

II.

{¶16} Appellant argues that the trial court failed to allow him to make a statement prior to imposing sentence.

{¶17} Appellant has failed to provide this Court with a transcript of the sentencing hearing. 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, must presume the validity of the lower court's proceedings, and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶18} We further note that the judgment entry of sentencing specifically contradicts appellant's claim:

{¶19} "The Court asked the defendant whether he had anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting

with his attorney, said that he had nothing further to say except that which he had already said[.]" Judgment Entry, January 12, 2011.

{¶20} Similarly, the judgment sentencing appellant after revoking his community control sanction recites:

> Whereupon, the Court was duly informed in the premises on the part of the State of Ohio by the Prosecuting Attorney and on the part of the defendant, by the defendant and his Attorney, and thereafter the Court asked the defendant whether he had anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his Attorney, said that he had nothing further to say except that which he had already said[.] Judgment Entry, May 7, 2012.

{¶21} The second assignment of error is overruled.

{¶22} The judgment of the Stark County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.