[Cite as *State v. Belton*, 2011-Ohio-1141.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-10-1347

Appellee — Trial Court No. CR0200802934

v.

Anthony Belton — **DECISION AND JUDGMENT**

Appellant — Decided: March 8, 2011

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Jeffrey M. Gamso, for appellant.

* * * * *

PER CURIAM.

{¶ 1} On December 9, 2010, this court ordered the parties to file jurisdictional memoranda addressing whether this court retains jurisdiction to hear this appeal from an order entered November 3, 2010. Based upon our review of the record and the parties' memoranda, we find the court lacks jurisdiction to hear this appeal. In doing so, we

conclude that a prior order, dated November 30, 2009, denying appellant's constitutional challenge to Crim.R. 11(C)(3) and R.C. 2909.03 is now a final appealable order. However, appellant did not appeal that final order. Instead, appellant is appealing the denial of his motion for reconsideration, which is void as a matter of law.

Background

{¶ 2} This appeal arises from appellant's constitutional challenge to Crim.R. 11(C)(3) and R.C. 2929.03, its statutory counterpart. On August 25, 2008, appellant, Anthony Belton, was indicted for three counts of aggravated murder and robbery. The indictment also contained a capital specification. Appellant initially entered a not guilty plea on September 3, 2008. However, on October 25, 2010, appellant filed a "Notice of Intent to Admit in Accordance with Crim.R. 11(C)(3) * * *."

A. Capital Plea Scheme

{¶ 3} If a defendant charged with a capital crime enters a plea of no contest or guilty, the defendant waives his right to a jury trial. A three-judge panel is impaneled to determine whether there is sufficient evidence to find the defendant guilty, and if so, to determine the presence or absence of "aggravating or mitigating" factors in a subsequent hearing in deciding whether to impose a penalty of life imprisonment or death.

{¶ 4} This procedure is governed by Crim.R. 11(C)(3), which states:

{¶ 5} "With respect to aggravated murder * * * the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of

guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea. * * *

{¶ 6} "If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and * * * if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly."

{¶ 7} R.C. 2945.06 is a statutory counterpart to Crim.R. 11(C)(3):

{¶ 8} "In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court * * *. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence

accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death." See, also, R.C. 2929.03 and 2929.04.

{¶ 9} In summary, under these provisions, once a capital defendant enters a plea of guilty or no contest to a capital crime and is adjudged guilty, the presence of aggravating or mitigating circumstances (and corresponding decision to impose a sentence of death or life imprisonment) is determined by a three-judge panel, not a jury.

B. Appellant's Constitutional Challenge

{¶ 10} On February 19, 2009, appellant filed a motion challenging the constitutionality of Crim.R. 11(C)(3) and its statutory counterparts. Appellant argued that pursuant to the United States Supreme Court's decision in *Ring v. Arizona* (2002), 536 U.S. 584, the Sixth Amendment requires that a jury, not a three-judge panel, determine the existence of aggravated and mitigating factors and balance and weigh their respective importance in determining the appropriate penalty. The trial court issued a decision on November 30, 2009, finding that R.C. 2929.03 and Crim.R. 11(C)(3) do not violate the right to a jury trial.

{¶ 11} On October 25, 2010, approximately 11 months later, appellant filed a "Notice of Intent to Admit in Accordance with Crim.R. 11(C)(3) and Impanel a Jury for Determination of Appropriate Sentence" in the trial court. Appellant simultaneously asked the trial court to reconsider the November 30, 2009 order finding R.C. 2929.03 and Crim.R. 11(C)(3) constitutional. The trial court entered a nunc pro tunc entry on

November 3, 2010, denying appellant's oral motion for reconsideration. Appellant filed a notice of appeal from the order denying his motion for reconsideration.

Final Appealable Order

{¶ 12} The parties disagree on the basic issue of whether this court has jurisdiction to hear this appeal. In determining whether this appeal involves a final appealable order under R.C. 2505.02, we are guided by the Supreme Court of Ohio's decision in *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, and the Twelfth Appellate District's recent decision in *State v. Avila-Villa*, 12th Dist. No. CA2010-08-201, discretionary appeal not allowed, 127 Ohio St.3d 1447, 2010-Ohio-5762.

A. State v. Ketterer

{¶ 13} In *State v. Ketterer*, 2006-Ohio-5283, the defendant-appellant appealed the imposition of his death sentence. Ketterer pled guilty and waived his right to a jury determination under R.C. 2929.03 and Crim.R. 11(C)(3). *Ketterer*, 2006-Ohio-5283, ¶ 10. The trial court impaneled a three-judge panel. The panel found Ketterer guilty of aggravated murder, and after the penalty phase hearing, sentenced Ketterer to death. Id. at ¶ 11.

{¶ 14} On appeal, Ketterer argued that the Sixth Amendment required that a jury, not a three-judge panel, determine the appropriate penalty. However, the Ohio Supreme Court refused to address this constitutional argument finding Ketterer waived his constitutional challenge by entering a plea of guilty:

{¶ 15} "Separate penalty-phase jury. Ketterer first argues that the trial court denied his constitutional right to have a jury determine the penalty to be imposed. See, e.g., *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, interpreting *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, which reiterates a defendant's right to have a jury find the facts relevant to sentencing.

{¶ 16} "However, we reject Ketterer's argument because Ketterer knowingly, intelligently, and voluntarily waived his right to a jury trial. Later, he knowingly, intelligently, and voluntarily pleaded guilty as charged. On both occasions, Ketterer acknowledged that he was waiving any right to have a jury decide what penalty to impose for the aggravated murder. Having freely relinquished his right, he cannot now argue that the trial court denied that right. 'When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees.' *Ruiz*, 536 U.S. at 628, 122 S.Ct. 2450, 153 L.Ed.2d 586, citing *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Accord *United States v. Bradley* (C.A.6, 2005), 400 F.3d 459, 463 (a plea agreement 'most pertinently [waives] the right to a trial by jury').

{¶ 17} "Further, the applicable statute, R.C. 2945.06, as well as Crim.R. 11(C)(3), contains no provisions permitting an accused charged with aggravated murder to waive a jury, request that three judges determine guilt upon a plea of guilty, and then have a jury decide the penalty. Instead, R.C. 2945.06 directs, 'If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses * * *

[and determine guilt] and pronounce sentence accordingly.'" (Emphasis in original.) Id. at ¶ 122-124.

{¶ 18} Therefore, the Ohio Supreme Court holds that once a defendant charged with a capital crime enters a plea pursuant to Crim.R. 11(C)(3), the defendant voluntarily waives the right to a jury and to challenge the constitutionality of this rule and the corresponding statute under *Ring*. Thus, any appeal by Belton challenging the capital plea scheme under *Ring* after he enters a plea under Crim.R. 11(C)(3) would be waived pursuant to *Ketterer*. Id. *Ketterer* clearly contemplates that a constitutional challenge to Crim.R. 11(C)(3) and the corresponding statute must proceed via interlocutory appeal of a final order. The state fails to address the impact of *Ketterer* in its jurisdictional memorandum.

B. State v. Avila-Villa

{¶ 19} However, the state argues that this appeal should be dismissed pursuant to the Twelfth District's recent decision in *State v. Avila-Villa*, 12th Dist. No. CA2010-08-201. In *Avila-Villa*, the defendant was also charged with a capital crime and also challenged the constitutionality of the capital plea scheme. However, the trial court denied Avila-Villa's challenge finding the constitutional challenge was "not ripe for consideration" because Avila-Villa had not indicated an intent to enter a plea under Crim.R. 11(C)(3). Avila-Villa appealed. The Twelfth District summarily affirmed the judgment.

{¶ 20} The state's reliance on *Avila-Villa* is misplaced for two reasons. First, the Twelfth District's decision makes no reference to *Ketterer*. But more importantly, the procedural facts of this case are materially different from those in *Avila-Villa*. In *Avila-Villa*, the trial court found that the constitutional challenge to the capital plea scheme was not "ripe" because Avila-Villa had not indicated an intent to plea under Crim.R. 11(C)(3) when raising her constitutional challenge. The Twelfth District affirmed that ruling.

{¶ 21} However, in this case, on October 25, 2010, Belton filed a "Notice of Intent to Admit in Accordance with Crim.R. 11(C)(3) * * *." Thus, unlike *Avila-Villa*, we find that the constitutional challenge to Crim.R. 11(C)(3) is ripe, and appellant's October 25 notice of intent to admit transformed the November 30, 2009 interim order denying his constitutional challenge into a final appealable order under R.C. 2505.02. Appellant had 30 days from the date of the October 25 notice to file a timely notice of appeal under App.R. 4. Our conclusion is consistent with the Ohio Supreme Court's decision in *Ketterer*. *Ketterer*, supra, ¶ 122-124.

Appeal of Void Judgment

{¶ 22} While we conclude that appellant's notice of intent to admit transformed the November 30, 2009 order into a final appealable order, appellant failed to appeal that final order in this case. Appellant's notice of appeal makes *no* mention of the November 30 order. Appellant also failed to attach a copy of the November 30 order to his notice of appeal. See, e.g., App.R. 3(D) and 6th Dist.Loc.App.R. 3(A) (Appellant must identify the date of the judgment and attach a copy of the judgment being appealed.) Instead,

appellant's notice of appeal states he is appealing the trial court's October 25, 2010 decision denying his motion for reconsideration of the November 30 order.

{¶ 23} Appellant is actually appealing from an order denying reconsideration of a final judgment. There is no such thing as a motion for reconsideration of a final judgment in a criminal case:

{¶ 24} "In *Bennett*, we noted, 'There is no authority for filing a motion for reconsideration of a final judgment at the trial court level in a criminal case.' *State v. Leach*, Clermont App. No. CA2004-02-011, 2005-Ohio-2370, at ¶ 6, citing *City of Cleveland Heights v. Richardson* (1983), 9 Ohio App.3d 152, 458 N.E.2d 901. It is well settled that a motion for reconsideration of a final judgment is a nullity. *State v. Stillman,* Fairfield App.No.2005-CA-55, 2005-Ohio-6299, ¶ 36, citing *Pitts v. Ohio Dept. of Trans.* (1981), 67 Ohio St.2d 378, 379, 423 N.E.2d 1105. * * *" *State v. Mills*, 5th Dist. No. 2008 AP 09 0061, 2009-Ohio-5771, ¶ 15.

{¶ 25} The notice of intent to plea transformed the November 30, 2009 judgment into a final order. Appellant did not appeal that final order. Instead, appellant appealed a void judgment entry denying his motion for reconsideration. This appeal is ordered dismissed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. It is so ordered.

APPEAL DISMISSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE