

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 25352

Appellee

v.

JIMMY LEONTA WILBORN

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 09 2990(A)

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

DICKINSON, Presiding Judge

INTRODUCTION

{¶1} Jimmy Wilborn pleaded guilty to two counts of aggravated robbery, one firearm specification, and one count of kidnapping. The trial court accepted his guilty plea and sentenced him to eight years in prison. This Court denied his motion for delayed appeal, concluding that his sentence was void. We vacated his sentence and remanded to the trial court for resentencing. Mr. Wilborn then moved to withdraw his guilty plea, but the trial court resentenced him without formally ruling on the motion to withdraw. He has appealed, asserting that the trial court incorrectly denied his motion to withdraw.

BACKGROUND

{¶2} Mr. Wilborn pleaded guilty to two counts of aggravated robbery, one firearm specification, and one count of kidnapping. The trial court accepted his plea and sentenced him to eight years in prison. Over a month after the trial court sentenced him, Mr. Wilborn filed a

pro se motion to withdraw his guilty plea, arguing that he had received ineffective assistance of counsel. In his motion, he asserted that his lawyer failed to interview witnesses and to provide a proper defense. The trial court denied his motion.

{¶3} Mr. Wilborn then moved this Court for leave to file a delayed appeal from the sentencing entry. This Court concluded that his sentence was void for failing to properly notify Mr. Wilborn of post-release control. We vacated the sentence and remanded to the Summit County Common Pleas Court for resentencing.

{¶4} Before his resentencing hearing, Mr. Wilborn filed a new motion to withdraw his guilty plea, arguing that he was denied his right to due process because the indictment failed to list the required mens rea for each of the offenses. He also argued that, because his sentence was void, the motion should be considered a presentence motion. The State responded, arguing that the Ohio Supreme Court's decision in *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, released between this Court's journal entry vacating Mr. Wilborn's sentence and his second motion to withdraw, made the upcoming hearing a hearing in accordance with Section 2929.19.1 of the Ohio Revised Code and not a resentencing. Therefore, the State argued, the motion to withdraw was a postsentence motion to withdraw and the trial court could only grant it in order to prevent a manifest injustice.

{¶5} The trial court never formally ruled on Mr. Wilborn's motion to withdraw his guilty plea. Instead, it held a resentencing hearing at which it informed Mr. Wilborn that, due to *Singleton*, it lacked the authority to resentence him and could only read him his original sentence and then properly notify him of post-release control. The trial court then issued a new sentencing entry.

MOTION TO WITHDRAW

{¶6} Mr. Wilborn’s sole assignment of error is that the trial court incorrectly denied his motion to withdraw his plea. In support, he has argued that his indictment failed to properly list the essential elements of the offenses with which he was charged and that his counsel was ineffective for failing to object to the indictment. Additionally, he has argued that the trial court should have held a hearing before denying his motion to withdraw his plea. Though the trial court did not expressly rule on the motion, this Court presumes that pending motions are implicitly denied when the trial court enters judgment. *Rothschild v. Eckstein*, 9th Dist. No. 09CA009733, 2010-Ohio-4285, at ¶19 (citing *Ward v. Summa Health System*, 9th Dist. No. 24567, 2009-Ohio-4859, at ¶21).

{¶7} Between the time this Court vacated Mr. Wilborn’s sentence for being void and his resentencing hearing before the trial court, the Ohio Supreme Court decided *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434. Under *Singleton* and the recently decided *State v. Fischer*, ___ Ohio St. 3d ___, 2010-Ohio-6238, the vacation of Mr. Wilborn’s sentence should have been limited to the improperly imposed post-release control, leaving the rest of the sentence intact. See *Fischer*, 2010-Ohio-6238, at ¶26-28; *Singleton*, 2010-Ohio-6434, at ¶24. Because we vacated his entire sentence, however, Mr. Wilborn’s motion to withdraw his guilty plea was a presentence motion. *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, syllabus.

{¶8} “[A] presentence motion to withdraw a guilty plea should be freely and liberally granted.” *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, at ¶7 (quoting *State v. Xie*, 62 Ohio St. 3d 521, 527 (1992)). When a motion to withdraw a plea is a presentence motion, “[t]he trial court must conduct a hearing to determine whether there is a reasonable and legitimate basis

for the withdrawal of the plea.” *Id.* at ¶10 (quoting *Xie*, 62 Ohio St. 3d at 527). Under *Xie*, the trial court does not have any discretion regarding whether it should hold a hearing on a presentence motion to withdraw a plea. The trial court was required to hold a hearing on Mr. Wilborn’s motion to withdraw.

{¶9} This Court, however, must disregard “[a]ny error, defect, irregularity, or variance which does not affect substantial rights” Crim.R. 52(A). In his brief, Mr. Wilborn has reiterated the argument from his motion to withdraw, which is that his indictment was insufficient under the Ohio Supreme Court’s ruling in *State v. Colon*, 118 Ohio St. 3d 26, 2008-Ohio-1624. After he filed his brief, however, the Ohio Supreme Court overruled *Colon* in *State v. Horner*, 126 Ohio St. 3d. 466, 2010-Ohio-3830, holding that “[a]n 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 paragraph one of the syllabus.

{¶10} Counts one and sixteen of Mr. Wilborn’s indictment charged him with aggravated robbery. Mr. Wilborn pleaded guilty to violating Section 2911.01(A)(1) of the Ohio Revised Code by committing aggravated robbery. Section 2911.01(A)(1) provides that “[n]o person, in attempting or committing a theft offense . . . shall . . . [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” Both aggravated robbery counts in the indictment tracked this language. Further, the Ohio Supreme Court has previously held that aggravated robbery under Section 2911.01(A)(1) is a strict liability offense and, accordingly, does not require a mens rea to be listed in the indictment. *State v. Lester*, 123 Ohio St. 3d 396,

2009-Ohio-4225, at ¶32. Accordingly, with respect to counts one and sixteen, his indictment was sufficient.

{¶11} Count five charged Mr. Wilborn with violating Section 2911.11(A)(1) of the Ohio Revised Code by committing aggravated burglary. The indictment charged that Mr. Wilborn, along with two other men, “did, by force, stealth, or deception, trespass in an occupied structure . . . or in a separately secured or separately occupied portion thereof, when another person other than an accomplice of the offender was present, with purpose to commit in said structure or separately secured portion thereof, a criminal offense and . . . had a deadly weapon or dangerous ordinance, to wit: a firearm, on or about his person or under his control”

{¶12} This count tracks the statutory language of aggravated burglary and, therefore, is sufficient under *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830. We note, however, that the statement of the charge in count five tracks Section 2911.11(A)(2) of the Ohio Revised Code, not Section 2911.11(A)(1), the designation included in that count. Section 2911.11(A)(1) provides that “[n]o person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if . . . [t]he offender inflicts, or attempts or threatens to inflict physical harm on another.”

{¶13} Rule 7(B) of the Ohio Rules of Criminal Procedure, provides that an “[e]rror in the numerical designation . . . shall not be ground for dismissal of the indictment . . . if the error . . . did not prejudicially mislead the defendant.” This Court has previously held that the incorrect subsection number does not constitute a reversible error when the statement in the indictment

tracks the correct statutory language. See *State v. Ebersole*, 9th Dist. No. 19447, 1999 WL 980552 at *3 (Oct. 27, 1999) (“If [defendant] was confused by the numerical error, he could have—and should have—sought clarification prior to trial.”); *State v. Rosak*, 9th Dist. No. 15851, 1993 WL 89730 at *8 (Mar. 31, 1993) (holding that the incorrect subsection in both the indictment and judgment entry did not mislead the defendant). Mr. Wilborn has not argued that the mistake of the subsection number prejudicially misled him.

{¶14} “[T]he purposes of an indictment are to give an accused adequate notice of the charge, and enable an accused to protect himself or herself from any future prosecutions for the same incident.” *State v. Horner*, 126 Ohio St. 3d 466, 2010-Ohio-3830, at ¶11 (quoting *State v. Buehner*, 110 Ohio St. 3d 403, 2006-Ohio-4707, at ¶7). Given that count five tracked the statutory language, it provided Mr. Wilborn with adequate notice of the charge.

{¶15} Under Rule 36 of the Ohio Rules of Criminal Procedure, “[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.” Further, Rule 12(B) of the Ohio Rules of Appellate Procedure provides, in part, that “where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.” The trial court’s journal entry should be modified to replace the reference to Section 2911.11(A)(1) with Section 2911.11(A)(2).

{¶16} Because Mr. Wilborn’s indictment was sufficient in light of *Horner*, the trial court’s decision to not hold an evidentiary hearing amounts to harmless error because Mr. Wilborn failed to present a reasonable and legitimate reason to withdraw his plea. As his indictment was sufficient, his lawyer was not deficient for not objecting to it. Accordingly, Mr. Wilborn’s assignment of error is overruled.

CONCLUSION

{¶17} The trial court did not err by denying Mr. Wilborn's motion to withdraw his plea. The trial court's journal entry is modified to remove any reference to Section 2911.11(A)(1) and to substitute Section 2911.11(A)(2) in its place. The judgment of the trial court, as modified, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.

CONCURS IN JUDGMENT ONLY, SAYING:

{¶18} I concur in the judgment. However, I would conclude that the Court's discussion concerning the aggravated burglary charge is unnecessary in light of the very limited argument raised in Mr. Wilborn's merit brief.

APPEARANCES:

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.