

[Cite as *State v. Arthurs*, 2010-Ohio-624.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 09AP-409
	:	(C.P.C. No. 07CR-12-8847)
John R. Arthurs,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 23, 2010

Ron O'Brien, Prosecuting Attorney, *Sarah W. Creedon* and
Laura Swisher, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} John R. Arthurs is appealing from his conviction for murder, aggravated robbery, and having a weapon while under disability. He is also appealing from associated firearm specifications, and a repeat violent offender specification, with sentences of incarceration related to all of the above totaling 41 years to life. He assigns ten errors for our consideration:

ASSIGNMENT OF ERROR #1

APPELLANT'S INDICTMENT WAS DEFECTIVE UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AS THE STATE FAILED TO INCLUDE A MENTAL CULPABILITY ELEMENT FOR EITHER AGGRAVATED ROBBERY OR MURDER IN THE INDICTMENT.

ASSIGNMENT OF ERROR #2

THE TRIAL COURT ERRED WHEN IT OMITTED ACCOMPLICE INSTRUCTIONS FROM THE JURY CHARGE, THEREBY VIOLATING THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #3

APPELLANT'S CONVICTION FOR MURDER UNDER R.C. § 2903.02(B) VIOLATED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY ARTICLE 1, SECTIONS 2 & 10 OF THE OHIO CONSTITUTION, AND THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

ASSIGNMENT OF ERROR #4

THE TRIAL COURT ERRED IN ENTERING A GUILTY VERDICT ON THE CHARGE OF FELONY MURDER AS R.C. § 2903.02(B) EXPRESSLY PROVIDES THAT THE STATUTE IS INAPPLICABLE WHEN THE APPELLANT CAN BE CHARGED WITH INVOLUNTARY MANSLAUGHTER.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO DECLARE A MISTRIAL, IN VIOLATION OF APPELLANT'S RIGHTS TO REMAIN SILENT AND DUE PROCESS UNDER THE 5TH AND 14TH AMENDMENTS

TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #6

THE TRIAL COURT ERRED WHEN IT FOUND THAT THE APPELLANT'S SON WAS COMPETENT TO TESTIFY IN VIOLATION OF EVIDENCE RULE 601 AND THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #7

APPELLANT'S CONVICTIONS WERE BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE 1, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #8

THE COMBINED EFFECT OF MULTIPLE TRIAL COURT ERRORS VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #9

THE TRIAL COURT ERRED WHEN IT FAILED TO ADVISE THE APPELLANT AT SENTENCING THAT HE WOULD BE SUBJECT TO MANDATORY POST-RELEASE CONTROL UPON HIS RELEASE FROM PRISON IN VIOLATION OF R.C. § 2967.28, THEREBY RENDERING APPELLANT'S SENTENCE VOID.

ASSIGNMENT OF ERROR #10

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH

AMENDMENT TO THE U.S. CONSTITUTION, AND
ARTICLE I, SECTIONS 10 & 16 OF THE OHIO
CONSTITUTION.

{¶2} We will address the seventh assignment of error first because it provides a factual background for all of the assignments of error.

{¶3} In early December 2007, Terry Salmons ("Turtle") and Rick Leitwein ("Josh") were selling drugs from a residence in the southern part of Columbus, Ohio. John Arthurs ("Arthurs") and John Lee Gibson ("Gibson") decided to rob the men at the residence to get drugs and money. During the course of the robbery, Turtle was shot in the back. He died as a result of the wound he received.

{¶4} Arthurs and Gibson both had firearms with them. Gibson denied shooting Turtle, and testified for the State of Ohio after reaching a plea agreement, which guaranteed him only a ten-year term of incarceration for his involvement in the homicide and robbery. Gibson testified that Arthurs followed Turtle into the dining room of the house, following which Gibson heard a gunshot. Marijuana was stolen from the residence.

{¶5} Other testimony at trial established that Arthurs had previously been convicted of burglary, a felony of the second degree, which resulted in his legal disability from owning a firearm. The same conviction qualified Arthurs for a finding of guilty on a repeat violent offender specification under R.C. 2929.01.

{¶6} The testimony at trial provided sufficient proof that Arthurs, after announcing that he and Gibson were there to rob Turtle and Josh, followed Turtle into an adjoining

room, and shot him in the back. Turtle died from the wound. Arthurs and Gibson stole marijuana as part of the robbery.

{¶7} Aggravated robbery is defined in R.C. 2911.01 as:

(A) No person, in attempting or committing a theft offense, as defined in [R.C. 2913.01], or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have 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;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

{¶8} Arthurs, while both attempting and committing a theft offense, was armed with a firearm. Thus, he was guilty of aggravated robbery.

{¶9} Arthurs used the firearm to shoot Turtle, making Arthurs guilty of the three-year gun specification. See, e.g., *State v. Powell* (1991), 59 Ohio St.3d 62, paragraph two of the syllabus ("A three-year additional term of actual incarceration may be imposed pursuant to R.C. 2929.71 if the defendant has a firearm in his or her possession at any time during the commission of a felony."). Arthurs had a prior conviction for burglary, qualifying him for the repeat violent offender specification. See, e.g., *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, paragraph two of the syllabus ("When designating an offender as a 'repeat violent offender' pursuant to former R.C. 2929.01(DD), a trial court does not violate the Sixth Amendment by considering relevant information about the

offender's prior conviction that is part of the judicial record.") (following *Shepard v. United States* (2005), 544 U.S. 13, 125 S.Ct. 1254).

{¶10} The aggravated robbery convictions were fully supported by the evidence, and consistent with the weight of the evidence.

{¶11} Murder is defined in R.C. 2903.02 as:

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) *No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of [R.C. 2903.03 or 2903.04].*

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in [R.C. 2929.02].

(Emphasis added.)

{¶12} The State of Ohio chose to pursue a theory of felony murder under R.C. 2903.02(B). The testimony of Arthurs' accomplice supported a finding that Arthurs caused Turtle's death, and that Arthurs killed Turtle during the commission of a robbery. Since aggravated robbery is an offense of violence, Arthurs was clearly guilty of murder under R.C. 2903.02(B).

{¶13} The guilty verdict as to murder was based upon sufficient evidence, and was consistent with the manifest weight of the evidence.

{¶14} All the verdicts of guilty were appropriate, being supported by sufficient evidence and the manifest weight of the evidence. The seventh assignment of error is overruled.

{¶15} Turning to the other assignments of error, the first assignment of error alleges that the indictment which charged Arthurs was defective because it tracked the language of the aggravated robbery statute, R.C. 2911.01, and the language of the murder statute, R.C. 2903.02, without specifically identifying the culpable mental states which underlie the requisite offenses (theft and an offense of violence).

{¶16} The Supreme Court of Ohio briefly made this a legitimate argument when it decided *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 ("*Colon I*"). However, the Supreme Court of Ohio significantly retreated in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, commonly known as "*Colon II*":

We assume that the facts that led to our opinion in *Colon I* are unique. * * * [T]he defect in the defendant's indictment was not the only error that had occurred: the defective indictment resulted in several other violations of the defendant's rights. In *Colon I*, we concluded that there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense.

In a defective-indictment case that does not result in multiple errors that are inextricably linked to the flawed indictment such as those that occurred in *Colon I*, structural-error analysis would not be appropriate. As we stated in *Colon I*, when a defendant fails to object to an indictment that is defective because the indictment did not include an essential

element of the charged offense, a plain-error analysis is appropriate. Pursuant to Crim.R. 52(B), "plain errors" that affect a defendant's substantial rights "may be noticed although they were not brought to the attention of the court." In most defective-indictment cases in which the indictment fails to include an essential element of the charge, we expect that plain-error analysis, pursuant to Crim.R. 52(B), will be the proper analysis to apply.

Id. at ¶6-7.

{¶17} We have consistently found that the rationale of *Colon I* does not apply to situations where no defect in the indictment is alleged in the trial court such that the indictment can be easily amended. Especially in situations where the defendant and his or her counsel are on complete notice of the charges before and during trial as a result of the indictment listing the applicable statute by number, we will not find reversible error.

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

{¶19} In the second assignment of error, counsel for Arthurs points out that the trial judge failed to give a charge to the jury as required under R.C. 2923.03(D), the complicity statute.

{¶20} At one time, Ohio law barred a conviction based solely upon the uncorroborated testimony of an accomplice. The legislature changed that law in 1986, permitting accomplice testimony to be the basis for a finding of guilt. However, the legislature mandated that R.C. 2923.03(D) be applied and that juries be told:

(D) If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

"The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.

It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

{¶21} For some reason, the trial judge in Arthurs' trial did not give the required charge, despite the fact that Gibson was an admitted accomplice of Arthurs, and that Gibson was a key witness for the State of Ohio.

{¶22} Further, Craig Lowery ("Lowery") was also an important witness for the State of Ohio. Lowery was the person who drove the robbers to the scene of the robbery and then drove them away after the robbery and murder were completed. Lowery could also be considered an alleged accomplice for purposes of R.C. 2923.03(D). The mandatory charge was not given with respect to his testimony either.

{¶23} Again, for some unknown reason, trial counsel for Arthurs did not make an issue of the failure of the trial judge to give the mandatory jury trial charge at a time the mistake could have easily been corrected.

{¶24} Where counsel fails to draw an error to the attention of the trial court, the appellate courts perform a "plain error" analysis under Crim.R. 52(B). To prove plain error, the defense must establish that, but for the asserted deficiency, "the outcome of the trial clearly would have been otherwise." *State v. Underwood* (1983), 3 Ohio St.3d 12,

syllabus; Crim.R. 30(A); *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. We are under the mandate of the Supreme Court of Ohio that plain error should be found only "under exceptional circumstances and only to prevent a manifest miscarriage of justice." See *Id.* at paragraph three of the syllabus.

{¶25} We can find no miscarriage of justice in the trial of Arthurs. The testimony of Gibson and Lowery was consistent as to the circumstances surrounding the robbery and murder. That testimony was supported by the testimony of Josh, who was in the residence at the time of the robbery and homicide. Further, Arthurs confessed the shooting to his son, who also was called as a witness for the State of Ohio.

{¶26} Given the strength of the evidence presented at trial, no miscarriage of justice occurred, and no plain error can be found.

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

{¶28} In the third assignment of error, counsel for Arthurs alleges that R.C. 2903.02(B) is unconstitutional on a variety of theories.

{¶29} When the Ohio criminal code was revised in 1974, the Ohio legislature abandoned the long-held rule of law that a killing in the course of a violent crime was automatically a murder. This rule of law was commonly called the felony-murder rule.

{¶30} In the mid-1990s, the Ohio legislature amended the murder statute, R.C. 2903.02, to align Ohio law with the law of the vast majority of states and to re-enact the felony murder rule in the statute defining murder. Thus, for over 20 years, Ohio required that a killing be done purposely for the killing to be considered a murder. Ohio,

instead, labeled killings, done in the course of a felony but without a purpose to kill, as involuntary manslaughter. See R.C. 2903.04.

{¶31} Appellate counsel for Arthurs argues that a killing has to be purposeful to be a murder under the Ohio and United States Constitution. This is simply not the case. Neither the Supreme Court of Ohio nor the Supreme Court of the United States has found the felony murder rule to be constitutionally defective. See, e.g., *Tison v. Arizona* (1987), 481 U.S. 137, 157-58, 107 S.Ct. 1676 (holding that the Eighth Amendment does not bar capital punishment for a felony-murder conviction).

{¶32} Appellate counsel also alleges a defect in R.C. 2903.02 based upon the portion of R.C. 2903.02, which bars voluntary manslaughter (R.C. 2903.03) or involuntary manslaughter (R.C. 2903.04) from automatically becoming murder because they are felonies of the first degree in which the victims died. We view R.C. 2903.02(B) as nothing more than a ban on overzealous prosecution of violations of R.C. 2903.03 and 2903.04. Such a ban does not create a constitutional problem.

{¶33} The third assignment of error is overruled.

{¶34} Much of the above reasoning applies to the fourth assignment of error also. R.C. 2903.02(B) does not bar a conviction for murder where the underlying facts would also support a conviction for voluntary or involuntary manslaughter. Instead, R.C. 2903.02(B) bars turning a conviction for voluntary or involuntary manslaughter into a conviction for murder. Since the facts involving an involuntary or voluntary manslaughter automatically must involve a death of the victim, a conviction for a manslaughter could serve as the basis for a murder conviction in every such case unless the legislature made

it clear that felony murder must be based upon a first or second degree felony which does not automatically involve a homicide.

{¶35} In short, R.C. 2903.02 does not bar a murder conviction merely because the underlying facts could be construed as supporting a conviction for a manslaughter.

{¶36} The fourth assignment of error is overruled.

{¶37} In the fifth assignment of error, it is alleged that the trial judge abused his discretion when he failed to declare a mistrial after the son of Arthurs mentioned that his father had been arrested in the presence of a parole officer. The parole officer apparently was the parole officer for Arthurs, but the mention by Arthurs' son did not specifically indicate that relationship.

{¶38} The trial judge discussed the problem presented by the mention of a parole officer, and decided that Arthurs was not unfairly prejudiced. The decision was within the realm of the trial court's discretion. See evidence discussion.

{¶39} The fifth assignment of error is overruled.

{¶40} In the sixth assignment of error, counsel for Arthurs questions the competency of Arthurs' son to testify. The issues regarding the competency of witnesses is evolving and will continue to evolve. At one time, the issues regarding competency and the ability of a witness to testify were thoroughly immersed in religious belief. If a witness took a sacred oath and then lied, the witness could well fear that the result would be eternal damnation and the fires of hell. Far fewer people believe in the existence of a literal hell and fewer yet believe that lying under oath will result in being tortured in eternal

flames. Now the more common oath is that one risks the pains and penalties of a criminal conviction for perjury.

{¶41} Evid.R. 601(A) reads:

Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

{¶42} The son of Arthurs who testified was 16 years of age. He understood right from wrong and knew he would get in trouble if he lied under oath. His testimony at trial demonstrated his ability to receive impressions of fact and relate them. The trial court could reasonably find the young man to be competent to testify. The judge's finding of competency was not an abuse of discretion.

{¶43} The sixth assignment of error is overruled.

{¶44} In the eighth assignment of error, counsel for Arthurs alleges that the combined effects of multiple trial court errors deprived Arthurs of due process of law.

{¶45} The assigned errors set forth above have been overruled and do not in anyway indicate a violation of due process of law.

{¶46} Counsel mentions three additional issues under this assignment of error, none of which unfairly prejudiced Arthurs during his trial. First, counsel mentions the admission of a close-up photograph of the body of Terry Salmons, also known as Turtle. The admission of evidence is generally within the sound discretion of the trial court, and a reviewing court may reverse only upon the showing of an abuse of that discretion. See, e.g., *State v. Ahmed*, 103 Ohio St.3d 27, 40, 2004-Ohio-4190; *State v. Finnerty* (1989),

45 Ohio St.3d 104, 107; *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus; *State v. Hymore* (1967), 9 Ohio St.2d 122, 128.

{¶47} The photograph was consistent with the testimony at trial. Salmons was shot in the back in his residence, and made his way to the nearby street where he collapsed and died. The photograph shows the exit wound caused by the fatal gunshot. This was the only such photograph that the trial court admitted into evidence. We cannot say the trial judge abused his discretion in admitting a single photograph of the deceased.

{¶48} The trial court also allowed testimony and exhibits regarding controlled substances, which were found on Arthurs when he was arrested. The drugs were alleged to be part of what was stolen at the time of the robbery. Finding items stolen in a robbery in the possession of a person alleged to be one of the robbers does not make the stolen property inadmissible merely because the items are controlled substances.

{¶49} The trial court correctly ruled on this issue.

{¶50} Finally, appellate counsel for Arthurs alleges that the trial court was premature in giving a charge to encourage the jury to reach a verdict. The charge, commonly called a *Howard*¹ charge, was given on the third day of deliberations after the jury asked if it needed to come to full agreement on all accounts to avoid a mistrial. The trial judge indicated that he would accept verdicts on less than all the counts and then gave the *Howard* charge.

{¶51} There is no required period that a trial court must wait in order for the *Howard* charge to be appropriate. *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-

¹ *State v. Howard* (1989), 42 Ohio St.3d 18.

Ohio-5405, ¶11. A trial court's delivery of the *Howard* charge after only a few hours of deliberation has been upheld in numerous cases. See, e.g., *State v. Clifton*, 172 Ohio App.3d 86, 2007-Ohio-3392, ¶28; *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960; *State v. Nutt*, 4th Dist. No. 06CA2926, 2007-Ohio-3031, ¶12; *State v. Edwards*, 11th Dist. No. 2006-T-0038, 2006-Ohio-6349, ¶28; *State v. Adams*, 7th Dist. No. 02 JE 32, 2003-Ohio-1225; *State v. Smith*, 2nd Dist. No. 19370, 2003-Ohio-903. Here, the trial judge gave the *Howard* charge on the third day of deliberations. Thus, we find no error based solely on the length of elapsed time of the jury's deliberations. The trial court's decision to give the *Howard* charge was reasonable, and well within the trial court's discretion.

{¶52} The eighth assignment of error is overruled.

{¶53} In the ninth assignment of error, counsel for Arthurs argues that the sentence given to Arthurs is defective because Arthurs was not advised that post-release control was mandatory, not discretionary. Arthurs, in fact, received a sentence of 41 years to life imprisonment. To be released at all after he has served 41 years, he must face a parole board, unless Ohio statutes are changed, and some other means of releasing prisoners is devised. We cannot say the trial court erred, especially in light of the enactment of R.C. 2967.28(B), which allows the imposition of post-release control regardless of the trial court's failure to advise the person to be incarcerated of the existence of post-release control.

{¶54} The ninth assignment of error is overruled.

{¶55} In the tenth assignment of error, appellate counsel for Arthurs alleges that trial counsel rendered ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. Specifically, appellate counsel mentions trial counsel's failure to require the charge to the jury mandated by R.C. 2923.03(D). Trial counsel should have requested the charge, but the failure to do so could not have conceivably affected the outcome of the trial.

{¶56} Appellate counsel also submits that trial counsel should have requested a jury charge on the lesser included offense of involuntary manslaughter. Such an additional charge could have been refused by the trial judge as an attempt to confuse the jury. The facts were clearly consistent with a murder verdict of guilty. A charge on involuntary manslaughter would have highlighted the degree to which felony murder and involuntary manslaughter overlap, inviting the jury to ignore a clearly correct verdict of murder as an option and enter a finding of guilty to a lesser charge.

{¶57} The seminal case for determining the effectiveness or ineffectiveness of counsel is *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. See *State v. Carter* (1995), 72 Ohio St.3d 545, 557-58; *State v. Swann*, 171 Ohio App.3d 304, 2007-Ohio-2010, ¶23 (reversed on other grounds). The *Strickland* test has two prongs, which require that the appellant demonstrate: (1) that trial counsel's performance was deficient; and (2) resulting prejudice, which was so serious that, but for counsel's deficiencies, there exists a reasonable probability that the outcome of the trial would have been different. See *id*; accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. Prejudice from defective representation sufficient to justify reversal of a conviction exists only where

the result of a trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838.

{¶58} *Strickland* in essence requires that counsel not be performing as counsel, and does not call upon this court to evaluate every aspect of trial counsel's performance, and compare that to what counsel could have done or should have done differently. See *Carter* at 558 ("Judicial scrutiny of counsel's performance is to be highly deferential, and reviewing courts must refrain from second-guessing the strategic decisions of trial counsel."). To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* (citing *Strickland* at 689; *State v. Wickline* (1990), 50 Ohio St.3d 114, 126). Arthurs' trial counsel litigated diligently, and obtained a verdict of "not guilty" as to aggravated murder, the most serious charge in the indictment. Even if there were minor lapses, counsel's performance did not meet the *Strickland* standard for ineffective assistance of counsel.

{¶59} The tenth assignment of error is overruled.

{¶60} All ten assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.
