

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA11
	:	
v.	:	
	:	
TROY ZINN,	:	<u>DECISION AND JUDGMENT ENTRY</u>
	:	
Defendant-Appellant.	:	<u>RELEASED 9/30/03</u>

APPEARANCES:

APPELLANT PRO SE:	Troy Zinn Chillicothe Correctional Institution P.O. Box 5500 Chillicothe, Ohio 45601
COUNSEL FOR APPELLEE ¹ :	Jonathan D. Blanton Jackson County Prosecuting Attorney 350 Portsmouth Street, Suite 100 Jackson, Ohio 45640

EVANS, P.J.

{¶1} Defendant-Appellant Troy Zinn appeals the decision of the Jackson County Court of Common Pleas, which denied his motion for leave to file a motion for a new trial. Appellant argues that he has new evidence that he was unavoidably prevented from discovering within the time limits of Crim.R. 33(B) and concludes that the trial court erred in denying him leave to file a motion for a new trial.

¹ This appeal was decided without appellee's participation due to appellee filing briefs not conforming with Loc.App.R. 10.

{¶2} For the reasons that follow, we disagree with appellant and affirm the judgment of the trial court.

Lower Court Proceedings

{¶3} In June 1997, a grand jury charged Defendant-Appellant Troy Zinn with felonious assault, a violation of R.C. 2903.11; kidnapping, a violation of R.C. 2905.01; and rape, a violation of R.C. 2907.02. At the request of Zinn's counsel, the trial court ordered the Shawnee Forensic Center to evaluate Zinn's competency to stand trial. The evaluation indicated that Zinn had been taking several medications as prescribed by his doctor but was competent to stand trial.

{¶4} In September 1997, Zinn pled guilty to the assault and kidnapping charges in exchange for the state dismissing the rape charge. The trial court sentenced Zinn to consecutive terms of seven years for the felonious assault and nine years for the kidnapping.

{¶5} In 1998, Zinn filed a delayed appeal in this Court, which we denied, and a motion to withdraw his guilty plea in the trial court. The trial court denied the motion to withdraw the guilty plea. Zinn appealed the trial court's denial but voluntarily dismissed the appeal.

{¶6} In 1999, Zinn filed a motion for post-conviction relief. In his petition, Zinn alleged that he had newly discovered evidence in support of his petition. Specifically, he alleged that his physician, who had prescribed him the drugs he was taking at the time of the offense, had lost his medical license for his prescribing

practices. In later filings, Zinn alleged that the side effects of the combination of the medications and the improper prescribing practices were the newly discovered evidence on which he based his petition. However, at the hearing on his petition, Zinn relied only on facts relating to the side effects of the combination of medications he was taking at the time of the offense.

{¶7} After the hearing, the trial court denied Zinn's petition because Zinn filed it beyond the one-hundred-eighty-day limit provided in R.C. 2953.21. In so doing, the trial court found that the evidence at issue was within Zinn's knowledge and control when he pled guilty.

{¶8} Zinn appealed the trial court's denial of his petition for post-conviction relief. In March 2001, we affirmed the trial court's decision, finding that appellant's petition was untimely filed. We also concluded that competent, credible evidence supported the trial court's finding that Zinn was not unavoidably prevented from discovering the facts concerning the side effects of the combination of prescribed medication he was taking.

{¶9} In March 2002, Zinn filed a motion for leave to file a motion for a new trial. Appellant again relied on the same "new evidence" as the basis of his motion. Zinn asserted that the adverse psychotic reaction caused by the interaction of the various medications he was taking at the time of the offense prevented him from forming the requisite criminal intent. Further, Zinn claimed

that the adverse drug interaction was not known by the "medical community" at the time he was convicted and that it was subsequently discovered.

{¶10} Zinn included with his filings the affidavit of Robert N. Ludwig, M.D., who stated that from 1994 to 1999, the Physician's Desk Reference did not describe any contraindications between Zinn's three medications. Doctor Ludwig stated that based on medical evidence, newly discovered since 1999, the administration of these medications in combination has been prohibited because it can cause aggressive and violent behavior. This is the second affidavit executed by Dr. Ludwig that has been filed with the trial court. This affidavit is essentially the same as the affidavit the doctor executed earlier, which was filed in support of Zinn's petition for post-conviction relief. The only difference between the affidavits is that in this second affidavit, Dr. Ludwig states that the evidence of adverse drug interactions between Zinn's medications was not widely known until after 1999, when the Physician's Desk Reference included the contraindications.

{¶11} In May 2002, the trial court denied Zinn's motion, finding that it raised the same issues presented by his prior motions.

The Appeal

{¶12} Zinn timely filed his notice of appeal and presents the following assignments of error for our review.

{¶13} First Assignment of Error: "The trial court abused its discretion by not permitting the appellant to file a motion for a new trial based on newly discovered evidence."

{¶14} Second Assignment of Error: "The trial court erred in concluding that the evidence presented was not newly discovered simply because it would have resulted in the same conclusion as previously presented to the court but would have been arrived at by a route which did not exist at the time of the previous presentation."

{¶15} Appellant's assignments of error challenge the trial court's denial of his motion for leave to file a motion for a new trial. Accordingly, we will address appellant's assigned errors conjointly. However, for the reasons that follow, we do not reach the issue of whether Zinn has presented newly discovered evidence.

{¶16} "In using the term 'new trial,' Crim.R. 33 implicitly applies only to cases in which a trial has occurred. A defendant waives his right to a trial by pleading guilty. He further waives all appealable errors that may have occurred at trial, unless such errors prevented the defendant from voluntarily entering his plea." *State v. Carter* (Feb. 25, 2000), Pike App. No. 99CA636, citing *State v. Kelley* (1991), 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph two of the syllabus (citing Crim.R. 11 and *Boykin v. Alabama* (1969), 395 U.S. 238, 243, 89 S.Ct. 1709).

{¶17} Appellant pled guilty to assault and kidnapping. The record contains no evidence, nor does appellant argue, that his plea

was entered involuntarily. Therefore, appellant waived his right to a trial and any appealable errors that may have occurred at trial. The proper mechanism through which Zinn could request a trial after pleading guilty is a motion to withdraw his guilty pleas pursuant to Crim.R. 32.1. See *Carter*, supra. Appellant has previously filed a motion to withdraw his guilty pleas. The trial court denied that motion and Zinn chose not to pursue an appeal of that decision.

{¶18} In short, appellant cannot be entitled to a new trial because he never had a trial. Consequently, the trial court did not err by denying appellant's motion. Accordingly, appellant's assignments of error are overruled.

Conclusion

{¶19} Based on the foregoing, it is evident that the trial court did not err or abuse its discretion by denying Zinn's motion. Thus, appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

Harsha, J., and Abele, J.: Concur in Judgment and Opinion.

FOR THE COURT

BY:

David T. Evans
Presiding Judge