

[Cite as *State v. Kessler*, 2019-Ohio-540.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107088

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GARY R. KESLAR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-621517-A

BEFORE: Headen, J., E.T. Gallagher, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 14, 2019

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RAYMOND C. HEADEN, J.:

{¶1} Defendant-appellant Gary R. Keslar (“Keslar”) appeals from his conviction following a guilty plea. For the reasons that follow, we affirm.

Procedural and Factual History

{¶2} On October 20, 2017, Keslar was indicted on seven counts of burglary, six counts of theft, two counts of grand theft, and one count of resisting arrest. The underlying offenses are alleged to have occurred between May 19 and September 15, 2017.

{¶3} On October 25, 2017, Keslar pleaded not guilty to the indicted charges. On February 28, 2018, Keslar withdrew his not guilty plea. Following a plea colloquy, Keslar entered a plea of guilty to the seven counts of burglary as charged. The remaining counts in the indictment were dismissed.

{¶4} On March 22, 2018, the court sentenced Keslar to an aggregate sentence of 11 years in prison. The court also imposed restitution totaling \$23,389.25 to be paid to eight separate victims. Keslar appeals, presenting three assignments of error for our review.

Law and Analysis

I. Guilty Plea

{¶5} In his first assignment of error, Keslar argues that the trial court erred when it did not advise him that he was waiving certain constitutional rights by pleading guilty. Specifically, Keslar asserts that the trial court failed to fully explain his right to compulsory process.

{¶6} The underlying purpose of Crim.R. 11(C) is to convey certain information to a defendant so that he or she can make a voluntary and intelligent decision regarding whether to plead guilty. *State v. Ballard*, 66 Ohio St.2d 473, 479-480, 423 N.E.2d 115 (1981). “The standard for reviewing whether the trial court accepted a plea in compliance with Crim.R. 11(C) is a de novo standard of review.” *State v. Cardwell*, 8th Dist. Cuyahoga No. 92796, 2009-Ohio-6827, ¶ 26, citing *State v. Stewart*, 51 Ohio St.2d 86, 364 N.E.2d 1163 (1977).

{¶7} In order to ensure that a defendant enters a plea knowingly, voluntarily, and intelligently, a trial court must engage in an oral dialogue with the defendant in accordance with Crim.R. 11(C). *State v. Engle*, 74 Ohio St.3d 525, 527, 660 N.E.2d 450 (1996). Crim.R. 11(C) outlines the trial court’s duties in accepting guilty pleas:

- (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
 - (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
 - (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
 - (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶8} Trial courts must strictly comply with the requirements related to the waiver of constitutional rights under Crim.R. 11(C)(2)(c) in conducting plea colloquies, and a trial court's failure to inform a defendant of any right in that subsection invalidates the plea. *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200, 897 N.E.2d 621, ¶ 1. "Strict compliance does not require an exact recitation of the precise language of the rule, but instead focuses on whether the trial court explained or referred to the right in a manner reasonably intelligent to that defendant." *State v. Schmick*, 8th Dist. Cuyahoga No. 95210, 2011-Ohio-2263, ¶ 8. While an exact recitation of Crim.R. 11 is not required, this court notes that the clarity offered by such an exact recitation may provide trial courts a safe harbor and assist reviewing courts in challenges to a defendant's plea colloquy.

{¶9} After a thorough review of the plea hearing, we conclude that the trial court fully complied with Crim.R. 11 in ensuring that Keslar's plea was knowing, intelligent, and voluntary.

{¶10} Here, the record indicates the court conducted a full Crim.R. 11 hearing before accepting Keslar's plea. At the plea hearing, the court discussed the charges Keslar faced, the maximum penalties for the charges, and the effects of Keslar's plea as it related to the charges.

{¶11} Subsequently, the court engaged Keslar in a Crim.R. 11 colloquy. Keslar advised the court that he was not under the influence of any medication or drugs. The court then thoroughly reviewed the constitutional rights that Keslar was waiving and made sure that he understood that he was waiving those rights by pleading guilty. With respect to compulsory process, specifically, the following exchange took place:

THE COURT: Do you understand that you, through counsel, have the right to confront or cross-examine any witness who would testify against you at trial?

KESLAR: Yes, Your Honor.

THE COURT: Do you understand that you have the right to compulsory process, which means you have the right to subpoena witnesses or demand their attendance at trial if you would present a defense at trial?

KESLAR: Yes, Your Honor.

{¶12} Keslar also confirmed that no threats or promises had been made to induce him to enter a guilty plea.

{¶13} The court reviewed the nature of the charges with Keslar, as well as the maximum penalty for each charge. Keslar confirmed that he was satisfied with the representation he had received from his attorneys. Keslar also confirmed that there was nothing about the case or proceedings that he did not understand or would like explained more fully. The trial court accepted Keslar's guilty plea, finding that it was voluntarily and knowingly entered after he was fully advised of his constitutional rights.

{¶14} Keslar maintains that the trial court failed to fully explain the meaning of compulsory process, including the assurance that he would have access to the resources and authority of the courts to ensure the presence of a witness at trial. The trial court is not obligated to go beyond the requirements of Crim.R. 11 prior to accepting a guilty plea. *State v. Hudson*, 8th Dist. Cuyahoga No. 105177, 2017-Ohio-7406, ¶ 13, citing *State v. Williams*, 7th Dist. Mahoning No. 11MA131, 2012-Ohio-6277, ¶ 39. A guilty plea is not rendered invalid because the defendant was not informed of a right or waiver not enumerated in Crim.R. 11. *State v. Railing*, 8th Dist. Cuyahoga No. 67137, 1994 Ohio App. LEXIS 4703, 2 (Oct. 20, 1994). The trial court's explanation of Keslar's rights was sufficient for strict compliance with Crim.R. 11. The court used the language in Crim.R. 11 in informing Keslar that he was waiving the right to compulsory process, thus satisfying the rule's requirements. The court went further, explaining that compulsory process meant that Keslar would have the right to subpoena witnesses or demand their attendance at trial. Any additional explanations of compulsory process or a subpoena power is beyond the requirements of Crim.R. 11. The absence of any additional assurances, therefore, does not invalidate Keslar's knowing, intelligent, and voluntary guilty plea. Accordingly, Keslar's first assignment of error is overruled.

II. Restitution

{¶15} In his second assignment of error, Keslar argues that the trial court erred in ordering him to pay restitution without first making the mandated determinations pursuant to R.C. 2929.18(A)(1). Keslar argues that the court ordered him to pay \$23,389.25 without making a due process ascertainment that the amount of restitution bore a reasonable relationship to the loss suffered.

{¶16} When reviewing whether the trial court properly ordered restitution, appellate courts review for abuse of discretion. *State v. Waiters*, 191 Ohio App.3d 720, 2010-Ohio-5764, 947 N.E.2d 710, ¶ 12 (8th Dist.), citing *State v. Carrino*, 8th Dist. Cuyahoga No. 67696, 1995 Ohio App. LEXIS 1950, 2 (May 11, 1995). An abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶17} With respect to the amount of restitution imposed, the court “must engage in a ‘due process ascertainment that the amount of restitution bears a reasonable relationship to the loss suffered.’” *State v. McLaurin*, 8th Dist. Cuyahoga No. 103068, 2016-Ohio-933, ¶ 13, quoting *State v. Borders*, 12th Dist. Clermont No. CA2004-12-101, 2005-Ohio-4339, ¶ 36. Further, the amount must be supported by competent, credible evidence. *Id.*; *State v. Johnson*, 8th Dist. Cuyahoga No. 106450, 2018-Ohio-3670, ¶ 55, citing *State v. Gears*, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999).

{¶18} R.C. 2929.18(A)(1) provides that financial sanctions may be imposed on a felony defendant as follows:

Restitution by the offender to the victim of the offender’s crime or any survivor of the victim, in an amount based on the victim’s economic loss * * * If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount.

{¶19} Here, Keslar argues that the court should have held a hearing to determine the appropriate amount of restitution, and that the restitution amount was not supported by appropriate documentation in the record. We disagree.

{¶20} As an initial matter, a hearing on restitution is only required “if the offender, victim, or survivor disputes the amount.” R.C. 2929.18(A). Because Keslar did not object to the amount, the court was not required to hold a hearing.

{¶21} Further, because Keslar did not object to either the order of restitution generally, or the amount imposed, our review is limited to plain error. *McLaurin*, 8th Dist. Cuyahoga No. 103068, 2016-Ohio-933, citing *State v. Jarrett*, 8th Dist. Cuyahoga No. 90404, 2008-Ohio-4868, ¶ 14. Crim.R. 52(B) provides that “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” The Ohio Supreme Court has held that appellate courts are to notice plain error only in “exceptional circumstances” in order to prevent “a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91, 95, 372 N.E.2d 804 (1978).

{¶22} A review of the record shows that the state presented competent and credible evidence from which the court was able to discern the amount of restitution to a reasonable degree of certainty. Specifically, the amount owed to each victim or set of victims was supported by insurance documentation containing valuation, receipts, and insurance adjustments to substantiate numerous items taken from the victims’ homes and damage to the homes as a result of Keslar’s unlawful entry. In light of this evidence in the record, we do not find plain error in the trial court’s decision to order restitution in the amount of \$23,389.25. Therefore, Keslar’s second assignment of error is overruled.

III. Ineffective Assistance of Counsel

{¶23} In Keslar's third assignment of error, he argues that he was denied effective assistance of counsel when his trial counsel failed to object to the imposition of restitution.

{¶24} To establish ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance at trial was seriously flawed and deficient and fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 687-688.

{¶25} As discussed in our analysis of the second assignment of error, the imposition of restitution in this case was proper. The amount was supported by competent credible evidence and bore a reasonable relationship to the harm suffered by the victims at the hands of Keslar. Therefore, counsel's decision not to object to the restitution was not seriously flawed or deficient. Further, even if such a failure to object had been deficient, Keslar is unable to establish how the result of the proceedings would have been different had counsel objected. Because Keslar is unable to meet either prong of the *Strickland* test, we cannot conclude that he received ineffective assistance of counsel. Therefore, this assignment of error is overruled.

{¶26} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

EILEEN T. GALLAGHER, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR