[Cite as *Univ. Hts. v. D.H.*, 2020-Ohio-113.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF UNIVERSITY HEIGHTS, :

Plaintiff-Appellee, :

No. 108575

v. :

DH, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 16, 2020

Criminal Appeal from the Shaker Heights Municipal Court
Case No. 18CRB01354

Appearances:

Stephanie B. Scalise, Prosecuting Attorney, University Heights, *for appellee*.

DH, *pro se*.

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} This cause came to be upon the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. Defendant-appellant, DH ("DH") appeals from her no contest plea and assigns the following errors for our review:

I. Appellant's plea was not made knowingly, voluntarily, and intelligently due to the ineffective assistance of her trial counsel.

II. The trial court committed reversible error when it found appellant guilty without calling for an explanation of the circumstances as required by R.C. 2937.07 and without which there were no facts in evidence to support the offense charged.

III. The trial court erred by finding appellant guilty of telephone harassment when it improperly accepted her plea without complying with Crim.R. 11 and did not announce its verdict in open court.

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

{¶ 3} DH sent text messages to J.M., who is DH's ex-boyfriend, on November 26 and 27, 2018. Prior to this, J.M. had told DH "numerous times" to stop contacting him, and on June 6, 2018 and August 30, 2018, the University Heights Police Department contacted DH per J.M.'s request and ordered her to end all contact with J.M., including "telephone conversations, text messaging, email, and any type of social media."

{¶ 4} On December 5, 2018, DH was charged with one count of telecommunications harassment in violation of R.C. 2917.21, a first-degree misdemeanor. On February 27, 2019, DH pled no contest as charged. On April 10, 2019, the court sentenced DH to 60 days in jail, suspended, one year of probation, and a fine. The court also ordered DH to continue individual therapy and have no contact with J.M. It is from this plea that DH appeals. We note that appellee, University Heights, did not file an appellate brief in this case.

Ineffective assistance of counsel

{¶ 5} To succeed on a claim of ineffective assistance of counsel, a defendant must establish that his or her attorney's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel=s performance." *Id.* at 697. *See also State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 3743 (1989).

{¶ 6} "When a defendant claims ineffective assistance after entering a [no contest] plea, she must also show that the ineffective assistance precluded her from entering the plea knowingly and voluntarily." *State v. Mays*, 174 Ohio App. 3d 681, 2008-Ohio-128, 884 N.E.2d 607, ¶ 9 (8th Dist.). *See also State v. Wright*, 8th Dist. Cuyahoga No. 98345, 2013-Ohio-936, ¶ 11 (a "plea waives the defendant's right to claim he was prejudiced by the ineffective assistance of counsel, except to the extent that the defects complained of caused the plea to be less than knowing and voluntary").

{¶ 7} DH pled no contest to telecommunications harassment in violation of R.C. 2917.21(A)(5), which states, in pertinent part, as follows: "No person shall knowingly make or cause to be made a telecommunication * * * to another, if the * * * recipient * * * previously has told the caller not to make a telecommunication" to him or her.

{¶ 8} DH, who is representing herself pro se, argues that her trial counsel was ineffective by waiving a reading of the explanation of circumstances "when a reading of the explanation would have shown appellant lacked the mens rea to violate the statute * * *." Although somewhat unclear from her brief, we glean that DH's specific argument is that the trial court should have been able to consider "an exception" to the no-contact order "for responding to contact initiated by [J.M.]." DH does not cite any legal authority to support this notion, and, upon review, we find that no such exception exists.

{¶ 9} DH fails to set forth evidence or argument that she did not send the text messages knowingly, and she fails to show that, but for her counsel's performance, she would not have pled no contest. Accordingly, we cannot say that her counsel's performance was deficient, and her first assigned error is overruled.

No contest plea

{¶ 10} "Under R.C. 2937.07, when a trial court finds a defendant guilty after he or she has entered a no contest plea, the record must contain an 'explanation of circumstances' of the offense, i.e., a statement of facts sufficient to establish commission of the offense, supporting the guilty finding." *Middleburg Hts. v. Elsing*, 8th Dist. Cuyahoga No. 105231, 2017-Ohio-6891, ¶ 9. This court has further held that "a defendant is not prohibited from waiving the explanation of circumstances * * *." *Broadview Hts. v. Burrows*, 8th Dist. Cuyahoga No. 79161, 2001 Ohio App. LEXIS 4479 (Oct. 4, 2001).

{¶ 11} In the case at hand, the court asked DH's attorney the following question in DH's presence: "Counselor, do you waive the reading of the facts and explanation of circumstances?" The defense attorney replied, "I do, Your Honor." Despite this waiver, the court stated on the record at the plea hearing the following regarding the nature of DH's offense: "So I understand back in November last year, your client was charged with one count of telephone harassment indicating, sent text messages to [J.M.'s] cell phone, the 26th and 27th, after being told not to contact."

{¶ 12} DH argues that her "waiver was explicitly conditioned on her opportunity to speak to the circumstances at some future date, which condition having failed should vitiate the validity of her no contest plea." DH further argues that she "was explicitly promised that the opportunity would be presented at the sentencing hearing" for her "to make a statement on her own behalf pertaining to those circumstances."

{¶ 13} However, our review of the plea hearing transcript shows that the court did not promise DH that she would have an opportunity to "make a statement" at a later time. Rather, the court stated the following: "We will be setting a date for you to come back in for sentencing. Counsel will have reviewed [the probation department] recommendations, and also be here to speak and add anything else we need to know on your behalf."

{¶ 14} Upon review, we find no merit to DH's argument that the court erred by accepting her no contest plea without calling for an explanation of the circumstances. Specifically, we find that DH waived this right at the plea hearing.

See State v. Neal, 6th Dist. Lucas No. L-17-1193, 2018-Ohio-2596, ¶ 14 ("This court has repeatedly recognized that a defendant can waive his right to have the facts supporting the charges against him presented to the court"); *State v. Hoyle*, 8th Dist. Cuyahoga No. 102791, 2016-Ohio-586, ¶ 31 ("A mere change of heart regarding a guilty plea * * * is insufficient justification for the withdrawal of a guilty plea"). Accordingly, her second assigned error is overruled.

Crim.R. 11

{¶ 15} In DH's third and final assigned error, she argues that the court erred by failing to comply with Crim.R. 11 and failing to announce its verdict in open court.

{¶ 16} DH's conviction for telecommunications harassment in violation of R.C. 2917.21(A)(5) is a first-degree misdemeanor. Pursuant to R.C. 2929.24(A)(1), a court may impose a jail term of not more than 180 days as a penalty for first-degree misdemeanor offenses. Crim.R. 2(C) defines a "serious offense" as, among other things, "any misdemeanor for which the penalty * * * includes confinement for more than six months." Furthermore, Crim.R. 2(D) defines a petty offense as a misdemeanor other than a serious offense. Therefore, telecommunications harassment is a petty offense. *See State v. Kiner*, 10th Dist. Franklin No. 11AP-817, 2012-Ohio-2781.

{¶ 17} Pursuant to Crim.R. 11(E), before a court accepts a plea in "misdemeanor cases involving petty offenses," the court shall "inform[* * *] the defendant of the effect of the plea[* * *] of no contest * * *."

{¶ 18} In the case at hand, the court addressed DH personally, and she pled no contest in open court. The court explained to DH that by pleading no contest, she was "giving up the right to a trial, or a trial by jury" and asked defense counsel if he had explained to DH the potential penalties she faced. Furthermore, DH signed a written no contest plea form indicating that she read her rights, understood them, and was entering her plea knowingly, intelligently, and voluntarily. Part of this plea form explained that "a no contest plea does not admit your guilt, but does admit the truth of the facts alleged in the complaint against you. * * * A no contest plea cannot be used against you in a later civil or criminal case."

{¶ 19} Upon review, we find that the court complied with Crim.R. 11(E) when accepting DH's no contest plea.

{¶ 20} Pursuant to R.C. 2938.11(F), "[a]ny verdict arrived at by the jury, or * * * the court, shall be announced and received only in open court as soon as it is determined." The record in the instant case is clear that DH pled no contest to telecommunications harassment in open court. DH's argument that her "conviction in this matter must be vacated as a result of the trial court's * * * perfunctory finding of guilt that was not announced in open court" is without merit.

{¶ 21} Judgment affirmed.

It is ordered that appellee recover from 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 Shaker Heights Municipal Court to carry this judgment into execution. The defendant's

conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
EILEEN A. GALLAGHER, J., CONCUR