

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 08AP-978
v.	:	(C.P.C. No. 07CR-04-2370)
Mark Turner,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 21, 2009

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Robert D. Essex, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Mark Turner, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a plea of guilty, of possession of crack cocaine with major drug offender specification, in violation of R.C. 2925.11, which is a first-degree felony.

{¶2} On April 2, 2007, appellant was indicted on trafficking in drugs with a major drug offender specification. On October 8, 2008, after obtaining his third lawyer, appellant

pled guilty to the allegations in the indictment. In exchange for the plea, appellant's multiple felony charges in two other pending cases were reduced to misdemeanors. The State of Ohio, plaintiff-appellee, and appellant's counsel recommended a ten-year jail sentence. The trial court held a sentencing hearing and sentenced appellant to the recommended sentence of ten years of incarceration. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The trial court erred in accepting appellant's plea when there was sufficient indication that his plea was not entered into knowingly, intelligently and voluntarily.

{¶3} Appellant argues in his assignment of error that his guilty plea was not knowing, intelligent, and voluntary. A waiver of a defendant's constitutional right to trial must be knowing, intelligent, and voluntary. *State v. Engle*, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Crim.R. 11(C) provides:

Pleas of guilty and no contest in felony cases

* * *

(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.

{¶4} A trial court must strictly comply with Crim.R. 11 as it pertains to the waiver of federal constitutional rights. *Boykin v. Alabama* (1969), 395 U.S. 238, 243-44, 89 S.Ct. 1709. These constitutional rights include the right to trial by jury, the right of confrontation, and the privilege against self-incrimination. *Id.* However, substantial compliance with Crim.R. 11(C) is sufficient when waiving non-constitutional rights. *State v. Nero* (1990), 56 Ohio St.3d 106, 108. The non-constitutional rights of which a defendant must be informed are the nature of the charges with an understanding of the law in relation to the facts; the maximum penalty; and that, after entering a guilty plea or a no contest plea, the court may proceed to judgment and sentence. "Substantial compliance" means that, under the totality of the circumstances, the defendant subjectively understands the implications of his plea and the rights he is waiving. *Id.*

{¶5} In the present case, appellant contends there was a sufficient indication that he did not understand the proceedings and was "resistant" to entering his guilty plea. Appellant maintains the record is clear that he did not understand everything that was happening to him and pled guilty only because he felt he had no alternative. In support, appellant cites several exchanges between him and the trial court during the plea hearing. However, after a review of the record, it is clear to this court that appellant's guilty plea was entered knowingly, voluntarily, and intelligently. Appellant understood the

proceedings and understood what was at stake in pleading guilty. Although we agree appellant was "resistant" to entering his guilty plea, such resistance was a result of not wanting to spend ten years incarcerated and his great indecisiveness as to whether a jury trial might provide better odds of receiving a lesser sentence. Appellant's resistance was not the result of confusion or lack of intelligent consideration.

{¶6} Although surgically excerpting small snippets of appellant's dialogue from the plea hearings may suggest appellant did not wish to plead guilty, reading appellant's comments and replies to the trial court's questioning as a whole in their entire and proper context reveals a clear decision by appellant to accept the plea offer from the state. The discourse from the plea hearings between appellant, appellant's attorneys, the prosecutor, and the trial judge amounts to 37 transcript pages. Within those pages, the trial court explained to appellant in great detail and with great patience the choices of pleading guilty or presenting the matter to a jury, which the trial court offered to appellant several times. Although a full reproduction of the transcript of the proceedings herein would more completely demonstrate the voluntary, knowing, and intelligent nature of appellant's decision, the following summary and quotations from the plea hearings provide an accurate representation of the course of the proceedings.

{¶7} At the first plea hearing on May 28, 2008, appellant's first counsel, Steve Larson, stated that appellant was unhappy with the plea offer from the state. Larson suggested to appellant that he accept the offer because the case was "not exactly a triable case." The plea offer was for a flat ten-year jail sentence for the charge in the present case, which carried a maximum term of 20 years and a mandatory minimum term of ten years, with the felony charges in the other two cases to be reduced to

misdemeanors. Otherwise, the charges from all of his cases could have resulted in a 26-year sentence. Larson stated that appellant had been prepared to accept the offer but then changed his mind. After appellant stated he wanted to discharge Larson as his attorney, the trial court explained to appellant that, if he were found guilty of all of the charges, the court could impose a significantly longer prison term than ten years. Appellant stated he understood, and the trial court granted appellant's request that his attorney be dismissed.

{¶8} At the October 8, 2008 plea hearing, at which appellant was represented by his third attorney, Christopher Cooper, the prosecutor represented that appellant was going to accept the state's offer of a flat ten-year prison sentence for all of the pending charges against him. Appellant then stated:

THE DEFENDANT: Judge Pfeiffer, I'm confused. I want to drop my plea. I was promised something different, not from Mr. Cooper but Steve Larson, that the maximum I was going to get was five years.

The court replied that he had not yet entered a plea of guilty, and the court had no way of knowing about any other discussions between him and his former attorney. The prosecutor countered that the offer, in fact, had been the same to appellant under all three of his attorneys.

{¶9} The trial court then asked appellant if he wanted to go forward with the state's offer. The trial court reminded him he needed to make a decision and explained the matter had been pending for a number of months, and he had had ample opportunity to consult all three of his attorneys. The judge stated she needed to know whether she needed to call a jury, "because if you want a jury trial on it, that's fine. It's no big deal to

me, that's what I'm here to do, so you just need to make that decision on the matter." Appellant then stated he was confused, indicating that Larson did not mention a major drug offender classification, and he did not know he was facing that much imprisonment time. The following exchange then took place:

THE COURT: * * * So, do you need more time? I mean, we were set for trial yesterday --

THE DEFENDANT: Yes, ma'am.

THE COURT: -- again on this case. So there has been -- it's not like anybody is rushing you into entering a guilty plea here. You've had a lot more time than a lot of people have.

THE DEFENDANT: Yes, ma'am.

THE COURT: As I said, I just need to know if we need to let the Jury Commissioner know if we need to have a jury. We have some other matters to do.

Do you need to talk to Mr. Cooper some more?

THE DEFENDANT: Yes, ma'am. I am not trying to make you mad. I don't know.

{¶10} After returning from a break, during which appellant consulted with his attorney, appellant's counsel indicated that appellant wished to enter guilty pleas. The following exchange then took place:

THE COURT: Mr. Turner, do you want to proceed with the pleas on this matter?

THE DEFENDANT: Yes, I do. I guess I have no choice of winning.

THE COURT: You what?

THE DEFENDANT: I did want to go to trial but my attorney said I had no chance of winning. I'll go ahead and cop out to the ten years.

{¶11} The court then asked appellant whether he understood he had a right to a trial and he was giving up the right by pleading guilty. Appellant replied, "[c]orrect." The court asked if anyone was forcing him to enter a plea of guilty to which appellant responded, "[n]o, I am not being forced." The court asked whether he was doing it because he had talked about the possible consequences with his attorney, and appellant replied, "[y]es." Appellant also said he understood that the state's offer was ten years less than he could get on the current charge if he went to trial and was found guilty. The following exchange then took place:

THE COURT: All right. Do you understand that by entering these pleas of guilty then, you are giving up your right to have that trial and giving up your right to have a jury make the decision about whether you are guilty of these offenses?

THE DEFENDANT: Judge, I don't know. I just want to get it over with, I guess, yes.

THE COURT: Do you understand --

THE DEFENDANT: I don't understand. I don't understand.

THE COURT: What is it that you don't understand?

THE DEFENDANT: Okay. I understand[,] Judge Pfeiffer, yes.

{¶12} Appellant indicated that he had other misdemeanor and felony offenses before, and he understood that he had the right to a trial. He also understood it would be the state's burden to prove the elements of the offenses beyond a reasonable doubt, he had a Fifth Amendment right to remain silent, his choice to remain silent could not be used against him, and he would have the right to question witnesses at trial. Appellant then stated:

THE DEFENDANT: * * * Judge Pfeiffer, I mean, if there's no confidence to winning -- I don't want to plead to ten years. I got kids. But I don't want to do 25 years if I don't have any chance of winning the case.

{¶13} The court responded that it was his attorney's job to give his opinion about appellant's chances at trial, and "obviously sometimes people don't like to hear what their attorneys do have to tell them. But, again, is anybody forcing you to enter the plea of guilty?" Appellant replied, "[n]o, ma'am. No, ma'am. Nobody is forcing me." The court then told appellant that he could have the court issue subpoenas on his behalf to require witnesses to appear, and appellant said he understood. Appellant stated that he reviewed the plea forms with his attorney, and his attorney explained the rights he was waiving. In reply to appellant's question about the appellate process, the trial court then explained appellant's appellate rights, and gave a detailed explanation of the appellate process and how long an appeal could take.

{¶14} After the trial court explained what appellant was pleading guilty to in his other cases, appellant said he understood and then asked, "If I take it to trial, if I get found guilty, do you give me the maximum sentence?" The court responded that it did not know what the sentence would be at this point. Appellant asked whether the sentence was determined by the prosecutor, and the trial court stated, no, it was the court that decided the sentences. When the judge then explained the maximum and mandatory terms possible in the present case, appellant asked, "That means no judicial – no early, is that correct?" The court responded, "Yes." Appellant then responded, "I'm better off taking it to trial, taking my chances at trial." The trial court replied that it did not know if he was better off because it had not yet heard the evidence in the case, and his attorney was in the best

position because he knew what evidence each side possessed. The following exchange then took place:

THE COURT: All right. The State and Mr. Cooper are recommending a sentence of ten years. Are you in agreement with serving the ten-year sentence on the case?

THE DEFENDANT: No.

THE COURT: Pardon?

THE DEFENDANT: No, ma'am.

THE COURT: Well, do you understand that that ten years is mandatory?

THE DEFENDANT: Yes.

THE COURT: Do you want to enter the plea of guilty knowing that there is a ten-year mandatory sentence that you would be -- that the Court would impose on this matter?

THE DEFENDANT: No.

THE COURT: So, you want us to get a jury up here, Mr. Turner?

THE DEFENDANT: No.

THE COURT: Mr. Turner --

THE DEFENDANT: I'll take the ten years, Judge Pfeiffer.

THE COURT: Mr. Turner, I am not forcing you into this.

THE DEFENDANT: It's hard to speak for myself.

THE COURT: Mr. Turner, you have had a lot of time.

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you want to enter the plea of guilty in this case?

THE DEFENDANT: Yes. Yes.

THE COURT: Or should we get a jury?

THE DEFENDANT: Plead guilty.

THE COURT: And you're in agreement with your attorney and the prosecutor recommending ten years be served on this?

THE DEFENDANT: Yes.

THE COURT: Has anybody forced you to do that?

THE DEFENDANT: No.

{¶15} The trial court then asked appellant again whether he had any other questions about entering the plea of guilty and whether anyone had forced him to enter the plea of guilty, both to which appellant responded in the negative. At the end of the hearing, when the trial court asked him whether he had anything further to say, appellant stated:

THE DEFENDANT: Yes. Like I said, I want to apologize for dragging this on. I was nervous about my charges. I just wish you would give me a fair sentence. I have three kids to take care of. I was no part-time dad. I didn't know what I was getting myself into.

I want to apologize to the Court, Judge Pfeiffer.

{¶16} The final paragraph above well summarizes appellant's difficulties here. Appellant's problem was not that he did not understand the consequences of his plea but that he was reluctant to serve a substantial prison sentence. It is apparent that appellant knew that, if he decided to present the matter to a jury, he may well have ended up receiving a longer sentence. Appellant's problem was indecision not incomprehension. Although at numerous points during the proceedings it is evident appellant considered

that a jury trial might be worth the risk of receiving a greater sentence than the state's offer, he finally determined that the risk was not worth it. The trial court fully informed appellant of the risks and consequences involved, as well as all of the other notices and acknowledgments required by law.

{¶17} In sum, insofar as appellant claims that his plea was not knowing, intelligent, and voluntary, from the record before us it is evident that the trial court informed appellant of the consequences of his guilty plea and did not accept his plea until it determined that the guilty plea was entered voluntarily and knowingly. The trial court engaged in a Crim.R. 11 colloquy with appellant. The judge asked appellant numerous times throughout the hearing if the plea was entered freely, voluntarily, and knowingly, to which appellant responded affirmatively every time. Appellant also clearly stated that no one had forced him to enter the plea, he was aware he could continue with a jury trial, and he entered his plea with full knowledge of what was taking place. The judge informed appellant he would be facing ten years in prison based upon the jointly recommended sentence. Therefore, after a thorough review of the record, we find appellant's guilty plea was knowing, intelligent, and voluntary. Appellant's assignment of error is overruled.

{¶18} Accordingly, appellant's single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

FRENCH, P.J., and McGRATH, J., concur.
